School Law Bulletin

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EDITOR
Robert P. Joyce

MANAGING EDITOR
Leslie Watkins

DESIGN
Daniel Soileau

DIRECTOR OF PUBLICATIONS
Carol Offen

EDITORIAL STAFF
Lucille Fidler
Jennifer Henderson

DESIGN STAFF
Michael Brady
Lisa Wright

Changes Affecting Elementary and Secondary Education

by Laurie L. Mesibov

THE DEATHS THIS PAST SPRING of fourteen students and one teacher at Columbine High School in Littleton, Colorado, haunt us all. In the wake of this tragedy people all across the country are struggling to figure out why Littleton happened and how to prevent violence at schools. At the same time, scores of schools, including schools in North Carolina, received threats of violence. Although concern for school safety obviously predated the spring of 1999 and already had led to many changes in school statutes, policies, and operations, Littleton apparently was a catalyst for additional action by the North Carolina General Assembly.[1] Much of the school law it enacted in 1999 is aimed at deterring violence or at holding accountable those responsible for violence or other illegal conduct at school.

The number of bomb threats received by North Carolina public schools increased dramatically as the 1999 school year drew to a close. Such threats, or mere rumors of such threats, cause disruption and may lead to the evacuation of school and to a heightened sense of fear and insecurity throughout a community. Threats also are expensive to investigate. The General Assembly responded to these problems by making changes in the school discipline statutes, criminal penalties, civil liability for parents, and mandatory driver's license revocations.

Violence grabbed the headlines, but the General Assembly also continued its efforts to improve student achievement and accountability. This session's legislative efforts focused not on any major new reform initiative, but on refining and evaluating programs already in place. In addition, the legislature paid greater attention to the need for high-quality alternative learning opportunities for students who are disruptive or at risk of academic failure. The decision to fund a significant pay increase for teachers and bonuses under the ABCs program has the ultimate goal of improving student learning. This article outlines the 1999 legislative changes directed at both school safety and student achievement.

Responses to Violence at School

Lose Control, Lose Your License

A major rite of passage for American teenagers is getting their learner's permit or driver's license. Before 1997 a minor could get a learner's permit simply by meeting the age requirement, having parental permission, and completing a driver training and safety education course. In 1997 the General Assembly added the requirement that any minor who does not have a high school diploma or its equivalent must have a "driving eligibility certificate." Under Section 20-11 of the North Carolina General Statutes (hereinafter G.S.), a principal or the principal's designee could issue a certificate for a minor student in public school only if (1) the minor was currently enrolled in school and making progress toward a high school diploma or its equivalent, (2) a substantial hardship would be placed on the minor or the minor's family if the minor did not receive a certificate, or (3) the minor could not make progress toward receiving a high

The author is an Institute of Government faculty member who specializes in school law.

1. Governor James B. Hunt also reacted by appointing the Task Force on Youth Violence and School Safety. The task force report, issued in August, is available through the governor's Website at www.governor.state.nc.us.

school diploma or its equivalent. This certificate requirement was designed as an incentive to keep students in school by taking advantage of the high value that teenagers place on being able to drive.

The 1999 General Assembly added a new restriction under G.S. 20-11, this one designed to encourage students to refrain from serious and dangerous misconduct. The restriction, commonly known as "lose control, lose your license," had been introduced in 1998 but did not pass. In 1999, in response to heightened concern about safety—and in spite of opposition from some educators who worried it would be an additional administrative burden—the measure did pass. SL 1999-243 (S 57), as amended by SL 1999-387 (H 1154), defines circumstances under which students who engage in certain kinds of misconduct will not receive, or will lose, their driving eligibility certificate and, therefore, their learner's permit or driver's license. These amendments cover all minor students enrolled in public schools, including charter schools, nonpublic schools, community colleges, and home schools.

The "lose control, lose your license" restriction applies when a minor student commits certain offenses on school property and as a result receives specified disciplinary sanctions. If a school official has not yet issued an eligibility certificate for the offending student, the official is prohibited from issuing one. If a certificate has been issued, the school official must report the disciplinary information to the Division of Motor Vehicles (DMV). It is the DMV's responsibility to take direct action on the permit or license.

The offenses are (1) possession or sale of alcohol or an illegal controlled substance on school property, (2) the bringing of a weapon or firearm to school or the possession or use of a weapon or firearm at school that results in disciplinary action under G.S. 115C-391(d1) (365-day suspension) or such possession or use away from school that could have resulted in a 365-day suspension if the conduct had occurred at school, and (3) physical assault on a teacher or other school personnel on school property. "School property" is (1) the physical premises of the school, (2) school buses or vehicles under the school's control or contract used to transport students, and (3) school-sponsored curricular or extracurricular activities that occur on or off the physical premises of the school. The disciplinary actions are (1) expulsion, (2) suspension for more than ten consecutive days, or (3) assignment to an alternative educational setting for more than ten consecutive days. For the conduct to be covered, it must have occurred after the first day of July prior to the student's eighth grade year or after the student's fourteenth birthday, whichever occurred first. The act becomes effective with respect to conduct that occurs on or after July 1, 2000.

A student who loses eligibility for a certificate may regain it. A student is again eligible for a certificate after the student has exhausted all administrative appeals connected to the disciplinary action and either (1) the conduct occurred before the student was fifteen years old and the student has since reached at least age sixteen, (2) the conduct occurred after the student was fifteen and at least one year after the date the student exhausted all administrative appeals connected to the disciplinary action, or (3) no other transportation is available and the student needs to drive to and from school, a drug or alcohol treatment counseling program, or a mental health treatment program.

Additionally, a student whose permit or license has been denied or revoked because he or she has lost eligibility for a certificate may regain eligibility if, after six months from the date of the ineligibility, (1) the student has returned to school or been placed in an alternative educational setting and has displayed exemplary behavior or (2) the disciplinary action was for the possession or sale of an alcoholic beverage or an illegal controlled substance on school property and the student subsequently attended and successfully completed a drug or alcohol treatment counseling program.

G.S. 115C-12(28) requires the North Carolina State Board of Education (the State Board) to adopt rules[2] related to these requirements. These rules must define what is "equivalent to a high school diploma" (because eligibility for a certificate turns on a student's progress toward earning a high school diploma or its equivalent), establish procedures that a person who is or was enrolled in a public school (including a charter school) must follow to obtain a driving eligibility certificate, require the appropriate school official to provide the driving eligibility certificate for a minor who meets all requirements, provide for an appeal to an appropriate education authority by a minor denied a certificate, define "exemplary student behavior" and "successful completion" of a drug or alcohol treatment counseling program.

The 1997 law on driving eligibility certificates was silent on the school's responsibility to obtain parental consent before releasing information about a student to

2. For a discussion of the State Board's rule-making process, see Ann McColl, "The North Carolina State Board of Education: Its Constitutional Authority and Rule-Making Procedures," *School Law Bulletin* 29 (Fall 1998): 1–11.

the DMV. Many people questioned whether releasing this information without parental consent would violate the federal Family Educational Rights and Privacy Act (FERPA). That issue was addressed in 1999. Parents, guardians, or emancipated juveniles must provide in advance their written, irrevocable consent for a public school, including a charter school, to disclose to the DMV that the student no longer meets the conditions for a driving eligibility certificate. The only information the school may disclose pursuant to this consent is whether the student is no longer eligible under G.S. 20-11(n)(1) or -11(n1). Presumably if consent is not given, the school official will not issue a driver eligibility certificate and the minor will not be able to drive legally.

G.S. 115C-288 assigns the school principal or the principal's designee three specific duties related to driving eligibility certificates. First, the principal must sign certificates for students who meet the conditions in G.S. 20-11. Second, the principal must obtain the written, irrevocable consent described above from parents, guardians, or emancipated juveniles. Third, the principal must notify the DMV when a student who holds a certificate no longer meets the eligibility conditions. For charter schools, G.S. 115C-238.29F assigns these duties to the designee of the school's board of directors.

Some educators expressed concerns about the potential cost of administering this act. Section 8.11 of the 1999 appropriations act, SL 1999-237 (H 168), permits the State Board to use funds appropriated for driver's education for the 1999–2000 and 2000–2001 fiscal years for the costs of issuing driving eligibility certificates.

365-day Suspension

For several years G.S. 115C-391(d1) has required the local school board or superintendent to suspend for 365 days any student who brings certain weapons onto school property. This requirement applied to weapons as defined in G.S. 14-269.2(b) and 14-296.2(g). The board may modify this suspension on the superintendent's recommendation.

SL 1999-257 (H 517), as amended by SL 1999-387, amends G.S. 115C-391(d1) by adding weapons as defined in G.S. 14-269.2(b1) and 14-269.2(h) to the list of weapons that trigger the 365-day suspension. As noted above, the suspension originally applied to any student who "brings a weapon onto school property." It now applies to any student who brings a weapon onto or possesses a weapon on educational property and to any student who brings a weapon to or possesses a weapon at a school-sponsored curricular or extracurricular activity held off of educational property.

SL 1999-257, as amended by SL 1999-387, enacts G.S. 115C-391(d3). This new section requires a local board of education (but not a superintendent) to suspend any student who makes a false report or perpetrates a hoax with a device that could reasonably be believed to be a bomb or other destructive device on educational property or at a school-sponsored curricular or extracurricular activity that occurs off educational property. As in G.S. 115C-391(d1), the board may modify the suspension upon recommendation of the superintendent. G.S. 115C-391(e) allows an appeal to the board of education of a superintendent's decision under G.S. 115C-391(d1) (365-day suspension for weapons), G.S. 115C-391(d2) (action by superintendent when a student assaults another person), and the new G.S. 115C-391(d3) (false reports), although the superintendent does not make this suspension decision.

Metal Detectors

An increasing number of schools use metal detectors at school and school-sponsored activities as part of their efforts to keep students and others safe, although some law enforcement officers worry that this may give school officials a false sense of security. Section 20.5 of SL 1999-237 appropriates $350,000 to the Department of Crime Control and Public Safety to provide metal detectors to public schools.

Criminal Penalties

Assault

SL 1999-105 (S 637) amends G.S. 143-33 to make it a Class A1 misdemeanor for a person to assault a school employee or volunteer (including certain independent contractors) when the employee or volunteer involved is carrying out his or her duties.

Possession of a Firearm

SL 1999-211 (S 1096) amends G.S. 14-269.2 to make it a felony for a school employee to possess or carry a firearm on educational property or to a curricular or extracurricular activity sponsored by a school. Under specified circumstances and depending on the person's status as employee or student at the time of the offense, the offense is a misdemeanor. In any event, the offense can be a misdemeanor and not a felony only if the firearm is not loaded and is in a locked container or locked firearm rack in a motor vehicle. A criminal violation does not result if a person takes or receives the

weapon from another person or finds the weapon and then delivers it, directly or indirectly, to law enforcement authorities as soon as practical.

Explosives

SL 1999-257 enacts amendments to set criminal penalties and to authorize court-ordered restitution for those convicted under G.S. 14-69.1 (making a false report of a destructive device at a public building) and G.S. 14-269.2 (perpetrating a hoax by the use of a false bomb or other device at a public building). "Educational property" as defined in G.S. 14-269.2 is a public building. SL 1999-257 sets the penalty for a person convicted under G.S. 14-269.2 of possessing or carrying explosives on educational property or for a person convicted of causing, encouraging, or aiding a minor to possess an explosive on educational property or at a school-sponsored curricular or extracurricular activity. A separate penalty is set for fireworks on educational property.

Parental Liability

Whenever a child engages in criminal conduct, questions arise about what the parents knew or should have known about their child's activities and whether the parents should be held accountable for their child's behavior. SL 1999-257 enacts new G.S. 1-538.3 to provide that a parent or legal guardian with care, custody, and control of an unemancipated minor may be held civilly liable to an educational entity for negligent supervision if the child makes a bomb threat, perpetrates a bomb hoax on a school, or brings certain weapons onto school property.

The educational entity must prove by clear, cogent, and convincing evidence that four conditions are met. First, that the minor violated G.S. 14-49, -49.1, -50, -69.1(c), -69.2(c), -269.2(b1), or -269.2(c1) or committed a felony offense involving injury to persons or property through the use of a gun, rifle, pistol, or other firearm of any kind as defined as G.S. 14-269.2(b) on educational property. Second, that the parent or guardian knew or reasonably should have known of the minor's likelihood to commit such an act. Third, that the parent or guardian had the opportunity and ability to control the minor. Fourth, that the parent or guardian did not make a reasonable effort to correct, restrain, or properly supervise the minor.

If these conditions are met, the educational entity must then prove its damages. Liability is limited to no more than $25,000 actual compensatory and consequential damages resulting from the disruption or dismissal of school or the school-sponsored activity arising from a minor's act. The limit increases to $50,000 in actual compensatory and consequential damages to educational property resulting from the discharge of a firearm or detonation or explosion of a bomb or other explosive device.

License Revocation

Independent of the "lose control, lose your license" statute discussed above, SL 1999-257 adds new G.S. 20-13.2 and amends G.S. 20-17 to require the DMV to revoke the permit or license of a minor or any other driver who is convicted of specified crimes involving explosives.

Improving School Safety and Student Achievement

Alternative Schools/Alternative Learning Programs

Educators and others have long been concerned about what happens to students who are suspended or expelled from school and students who simply do not fare well academically in the regular school setting. One response to this concern, the development of alternative schools and alternative learning programs, was encouraged last year in SL 1998-202. This year the General Assembly made development of alternative programs mandatory.

Section 8.25 of SL 1999-237 amends G.S. 115C-47(32a) to require each local board of education to establish at least one alternative school or alternative learning program by July 1, 2000, although G.S. 115C-105.26(c1) allows the State Board to waive the requirement. G.S. 115C-12(24) directs the State Board to develop guidelines and policies that define what constitutes an "alternative school" and an "alternative learning program." G.S. 115C-47(32a) requires local boards to adopt guidelines for assigning students to alternative programs or schools after considering the State Board's policies and guidelines.

In terms of staffing, the General Assembly "urges" local boards to adopt policies that prohibit the superintendent from assigning to an alternative learning program any professional school employee who has received within the last three years a rating on a formal evaluation that is less than "above standard." Pursuant to G.S. 115C-12(24), the State Board must review the qualifications of teachers assigned to alternative schools and learning programs and include this information in an annual report to General Assembly.

SL 1999-397 (S 1099) adds new G.S. 115C-105.48, which requires that before a school refers a student to an alternative school or learning program, the referring school must document the procedures that were used to identify the student as at risk of academic failure or as being disruptive or disorderly, provide reasons for the referral, and transfer all relevant student records to the alternative school or program. After a student is placed in an alternative school or program, appropriate school staff must meet to review the student's records and recommend support services and intervention strategies recommended for that student. Parents must be encouraged to provide input regarding the student's needs.

SL 1999-397 also amends G.S. 115C-47(32a) to require local boards to regularly assess whether the unit's alternative schools/learning programs incorporate best practices for improving student academic performance and reducing disruptive behavior, are staffed with employees who are well trained and are provided appropriate staff development, and are organized to provide coordinated services as well as high-quality and rigorous academic instruction.

Safe School Plans

For several years local school boards have been required to develop local plans for maintaining safe and orderly schools. SL 1999-397 amends G.S. 115C-105.47 to add components that must be in the plan. Each plan must now incorporate ways to assess and address the needs of students who are at risk of academic failure as well as students who are disruptive and disorderly, or both, and measures of the effectiveness of these efforts; a statement of the services that will be provided to students who are assigned to an alternative school or an alternative learning program; and a statement of the planned use of federal, state,[3] and local funds allocated for at-risk students and alternative schools and alternative learning programs.

Local school boards submit their safe school plans to the State Board of Education. G.S. 115C-105.46 sets out the State Board's responsibilities with regard to these plans, and G.S. 115C-12 is a broad list of the State Board's duties. As previously noted, G.S. 115C-12(24), as amended by SL 1999-237 and SL 1999-397, requires the State Board to develop policies that define who is an at-risk student and what constitutes an alternative school and an alternative learning program. The State Board also must measure the effectiveness of alternative learning programs.

SL 1999-397 requires local boards to submit their revised safe school plans to the State Board by July 1, 2000. The State Board must then review and make recommendations regarding their implementation. Local boards are encouraged to consider the State Board's recommendations before implementing their safe school plans.

School Improvement Teams

In an effort to improve student performance, G.S. 115C-105.27 requires each school to put together a team that is responsible for developing a school improvement plan containing strategies for improving student performance. SL 1999-397 amends G.S. 115C-105.27 to provide that the strategies in the plan must specify the instructional practices and methods to be used to improve the academic performance of students identified as at risk of academic failure or at risk of dropping out of school.

SL 1999-373 (S 977) amends G.S. 115C-288 to add to the list of a principal's duties the duty of ensuring that a school improvement team is established at each school to develop, review, and revise the school improvement plan. SL 1999-373 also amends G.S. 115C-47(38) to add to the list of a local board's duties the duty of adopting a policy to ensure that each principal has established a school improvement team. The superintendent or the superintendent's designee must provide guidance to principals.

In addition to the school's principal, each school improvement team has representatives of the assistant principals, instructional personnel, instructional support personnel, and teacher assistants as well as parents of students in the school. The procedure for selecting school personnel to serve on the team was not specified in the act establishing the teams. SL 1999-271 (H 1150) amends G.S. 115C-105.27 to provide that assistant principals, instructional personnel, instructional support personnel, and teacher assistants are to elect the representatives of their respective groups by secret ballot.

SL 1999-397 also requires school improvement teams to revise their plans during the 1999–2000 school year.

Charter School Evaluation

Charter schools are public schools that operate free of many of the restrictions that apply to other public

3. Section 8.25 of SL 1999-237 amends G.S. 115C-105.25(b) to require that funds allocated in the Alternative Schools/At-Risk Student allotment be spent only for alternative learning programs, at-risk students, and school safety programs.

schools. Each charter school is governed by a private nonprofit corporation, and enrollment in a charter school always is voluntary. The General Assembly authorized this new type of public school in 1996 for specific purposes: to improve student learning, increase learning opportunities for students, encourage the use of different and innovative teaching methods, create new opportunities for teachers, provide parents and students with expanded choices for education, and hold the charter schools accountable for student achievement.

Charter schools are a new, as yet unproven approach to public education, and their authorization and operation have been controversial. It is too soon to know whether this approach is meeting the goals the General Assembly set for it.

SL 1999-27 (H 216) amends G.S. 115C-238.29I(c) by directing the State Board to evaluate the educational effectiveness of the charter school approach and to make recommendations about its future. The recommendations must be based on (1) the current and projected impact of charter schools on the delivery of services by the public schools, (2) student academic progress in the charter schools as measured, where available, against the academic year immediately preceding the first academic year of the charter schools' operation, (3) best practices resulting from charter school operations, and (4) other information the State Board considers appropriate.

In addition to the evaluation, Section 8.28 of SL 1999-237 requires the State Board to study the fiscal impact of charter schools on local school administrative units.

Student Accountability

SL 1999-317 (S 942) directs the State Board to develop plans for implementing the Statewide Student Accountability Standards,[4] including identifying plans for using resources to ensure appropriate early and ongoing assistance for students.

Miscellaneous Legislation

Textbook Commission

The state Textbook Commission is responsible for selecting the basic textbooks needed for instruction in public schools,[5] although G.S. 115C-105.26 authorizes the State Board to grant local boards a waiver from using commission-adopted textbooks. G.S. 115C-85 defines "textbooks" as systematically organized material comprehensive enough to cover the primary objectives outlined in the standard course of study for a grade or course. Textbooks may be in print or nonprint formats and include technology-based programs.

Section 8.30 of SL 1999-237 amends G.S. 115C-88 to change the commission's method of evaluating books. Formerly, every principal, teacher, and parent on the commission had to examine and file an evaluation of each textbook offered for adoption. Now, each proposed textbook must be read by at least one expert certified in the discipline for which the textbook is proposed. If no commission or advisory committee member is an expert in a particular discipline, the commission may use external experts. In addition, the commission may consider other experts' reviews of a proposed textbook, but these reviews may not substitute for the direct examination of the book by a commission member, advisory committee member, or expert retained by the commission. An amendment to G.S. 115C-87 increases the Textbook Commission's membership from fourteen to twenty-three members, effective January 1, 2000.

Immunization

Unless they have a medical or religious exemption, children enrolling in North Carolina public schools need proof of certain immunizations. SL 1999-110 (S 614) amends G.S. 130A-154 to require a person who received immunizations in a state other than North Carolina to present an official certificate or record of immunization to the school. The record must contain specified minimum information.

Energy Conservation Measures

SL 1999-235 (S 56) amends G.S. 143-64.17(1) and -64.17(2), which deal with energy conservation measures and energy savings contracts, and repeals the sunset provision regarding the authority of a local government unit to enter into a guaranteed energy savings contract.

School-Based Health Clinics

SL 1999-4 (S 26) repeals the prohibition of reimbursement for services provided by school-based health clinics under the Health Insurance Program for Children, established in Section 8 of SL 1998-1 (Ex. Sess.).

4. 16 N.C. ADMIN. CODE 6 D.0305.

5. G.S. 115C-47(33) grants local boards of education sole authority to select and procure supplementary instructional materials.

Teacher Absences

Section 8.9 of SL 1999-237 provides that if a local education agency's number of teacher absences is higher than the state average, the local board must determine why and develop a plan to decrease the number of absences.

Students with Special Needs

Every year many students who have been identified as disabled in another state enroll for the first time in a North Carolina public school. Because each state has some leeway in setting its own eligibility standards, some of these students may not be identified as children with special needs in North Carolina. SL 1999-117 (S 1075) provides that if a local school unit serves a student with a current special education plan from another state while the school determines whether the child is eligible for services in North Carolina, the school unit is entitled to state funding for the services it provides while the determination is being made. The school unit need not repay the funds if the student does not qualify for services in North Carolina.

Breakfast

Section 8.26 of SL 1999-237 requires the State Board to expand the free school breakfast program to all kindergarten students by the start of the 2000–2001 school year.

Activity Buses

SL 1999-274 (H 1054) amends G.S. 20-142.3 to require all activity buses, as well as all school buses, to stop at all railroad crossings.

Appropriations

SL 1999-237 appropriates to the Department of Public Education $5.26 billion for fiscal year 1999–2000 and $5.28 billion for fiscal year 2000–2001. Highlights of the budget include $10 million for low-wealth school systems, $3 million for small school systems, $1.1 million to begin implementing a school breakfast program for all kindergarten students, $5 million for students with limited proficiency in English, and up to $2 million to develop a high school exit exam. Allocations for exceptional children are set at $789.78 per academically and intellectually gifted child, with a cap of 4 percent (of the school population), and at $2,374.17 per child with a disability, with a cap of 12.5 percent. Funds are allocated for ABCs bonus awards at the same rate as 1998. Section 8.18 appropriates $2.5 million from the State Literary Fund to the Department of Public Instruction for the 1999–2000 fiscal year to aid local school units.

Pilot Programs

ABCs Pilot

The ABCs Program, the state's accountability program, focuses on the performance of individual schools in the basics of reading, mathematics, and writing as compared to that school's performance the year before. Schools are expected to have a year's growth in achievement in a year's time. Students are tested annually to determine whether the school has met or exceeded its expected growth in student achievement, as determined by the State Board. A critical element of the ABCs Program is bonuses for personnel in schools that meet or exceed their goals in student achievement.

Section 8.36 of SL 1999-237 directs the State Board to establish a pilot program in up to five local school administrative units to test and evaluate a revised school accountability model. The program's purpose is to determine "whether revisions in the present school accountability model under the ABCs Plan are likely to result in more students demonstrating mastery of grade level subject matter and skills on end-of-grade tests or demonstrating mastery of course subject matter or skills on end-of-course tests." Note that the pilot program is to provide a different way of measuring student mastery, not a direct way of increasing student learning and achievement. All units in the pilot program are to use the same model, and personnel in participating schools will be eligible to receive financial awards for achievement in addition to awards received under the standard ABCs Program. School systems in the pilot program that are not designated as "low wealth" must contribute a 25 percent local match for the award. This program expires with the payment of awards for the 2004–2005 school year.

Communication Devices in Buses

SL 1999-275 (H 1187) directs the State Board to establish a pilot program in one or more school administrative units, including the Northampton County Schools, to enable local boards of education to use state school transportation funds to install communication devices in school buses.

Studies

Violent Students

SL 1999-257 directs the Joint Legislative Education Oversight Committee to study the issue of students who make or carry out threats or violence directed at schools or persons in the schools.

Differentiated Diplomas

Section 8.31 of SL 1999-237 authorizes the Joint Legislative Education Oversight Committee to study the issue of differentiated high school diplomas. The State Board must report to this committee before implementing any differentiated diploma plan.

School Size

Researchers and educators have long been interested in the relationship between school size and student learning. Now there is new interest in a possible relationship between high school size and the alienation and isolation that some students feel at school. Section 8.33 of SL 1999-237 requires the State Board to study the relationship between school size and students' academic performance and behavior.

Transportation for Children with Special Needs

Some children with special needs must travel long distances to receive an appropriate special education, and some cannot ride safely on a regular school bus. Nonetheless, most children with special needs are entitled to an instructional day that is as long as the instructional day for other students. Section 8.24 of SL 1999-237 directs the State Board to study the issue of school transportation for children with special needs, including the difficulty local school units have in meeting the length of school day requirements for some children.

Cooperative High School Education Programs

The 1998 General Assembly directed the State Board of Community Colleges and the State Board of Education to create a joint task force to study existing policies on cooperative high school education programs. Section 9.1 of SL 1999-237 asks the two boards to reconsider these policies and to make recommendations aimed at increasing the number of qualified high school students who participate in these programs.

Information Technology Systems

Section 8.34 of SL 1999-237 directs the Education Cabinet[6] to study the functions involving information technology systems.

Dropout Rates

SL 1999-257 directs the State Board to study the computation of dropout rates for the ABCs Program.

Tax Policy

The Studies Act, SL 1999-395 (H 163), establishes the North Carolina Tax Policy Commission to study, examine, and, if necessary, design a realignment of the state and local tax structure in accordance with a clear, consistent tax policy. Although the act gives the commission only this broad direction, the issue of whether local school boards should have independent taxing authority may become a part of the study.

Other Studies

SL 1999-395 authorizes the Legislative Research Commission to study driver education programs, teen drivers, seat belts on school buses, resolution of conflicts between boards of education and county commissioners, and school boards review of applicable court orders. The Joint Legislative Education Oversight Committee may study the concept of prekindergarten education. SL 1999-395 also creates the Commission on Improving the Academic Achievement of Minority and At-Risk Students and establishes the Study Commission on Children with Special Needs. This new commission replaces the Commission on Children with Special Needs, with the repeal of G.S. 120-58 through -65.

Unaddressed Areas

The 1999 General Assembly took no final action on several controversial issues. These include encouraging school boards to promote community-based schools by redrawing attendance lines and local bills authorizing an additional, optional, half-cent sales tax for specific counties. ■

6. The cabinet consists of the governor, the chair of the State Board, the superintendent of public instruction, the president of North Carolina Community Colleges, and the president of The University of North Carolina. G.S. 116C-1. The cabinet must invite representatives of private education to participate in its deliberations as adjunct members.

Changes Affecting Employment in the Public Schools

by Robert P. Joyce

AFTER THREE VERY ACTIVE SESSIONS in 1996, 1997, and 1998, the North Carolina General Assembly in 1999 took a break from enacting major legislation affecting employment in the public schools. In 1996 the new School-Based Management and Accountability Program,[1] commonly known as the ABCs Program, called for the classification of schools based on certain measures tied to student performance on particular standardized tests. By that legislation, numerous employment consequences for a school's teachers and administrators, including the potential for dismissal, spring from the classification of the school. The Excellent Schools Act of 1997 brought wholesale changes to school employment, affecting everything from teacher training through certification, tenure, and the procedures for dismissal. In 1998 the legislature worked to fine tune some of the earlier legislation and provided, in a break with the past, for the employment of uncertified teachers in certain circumstances.

The 1999 General Assembly continued the upward movement in teachers' salaries begun with the Excellent Schools Act, tinkered with certification and dismissal provisions, substantially addressed issues related to sexual harassment and improper sexual contact, and attempted to improve instructional conditions for teachers. This article summarizes legislation resulting from those actions.

The author, editor of *School Law Bulletin*, is an Institute of Government faculty member whose specialties include school employment law.

1. N.C. GEN. STAT. 115C-105.20 through -105.40.

Salaries, Calendar, and Leave

Salary Increases

The 1999 appropriations act, SL 1999-237 (H 168), enacts the teacher salary schedule for 1999–2000. For "A" certificate teachers the schedule ranges from $24,050—for first-year teachers employed on a ten-month basis—to $43,820—for teachers with twenty-nine-plus years of experience. For "G" certificate teachers the corresponding figures are $25,550 and $46,560. Certification based on the six-year degree level results in a salary that is $1,260 higher than compensation for "G" certificate teachers, whereas certification at the doctorate level results in salary that is $2,530 higher. The act also sets out salary schedules for principals and assistant principals and salary ranges for other administrators.

For the 1995–96 school year (the last year before passage of the ABCs Program and two years before passage of the Excellent Schools Act), the salary schedule called for a salary for a twenty-year teacher with an "A" certificate of $31,220. For 1999–2000, the corresponding figure is $37,890. The increase over that four-year period is approximately 21 percent.

In addition, the General Assembly enacted several other salary-related provisions. They are:

- Non-certificated employees received a 3 percent pay raise. The North Carolina State Board of Education (the State Board) was empowered to create salary ranges for non-certificated personnel.

- Most public school employees received a one-time bonus of $125.
- School nurses were continued on the "G" salary schedule.
- The Joint Legislative Education Oversight Committee was directed to conduct two salary-related studies, one on the issue of salaries for school central office personnel and the need for additional funding and another one on the necessity of establishing a salary schedule for teacher assistants.
- In addition to salary increases for teachers with a "G" certificate and higher levels of educational achievement (as described above), the salary schedules also call for higher salaries for teachers with certification from the National Board for Professional Teaching Standards. Section 8.7 of the appropriations act directs the State Board to pay the participation fee for teachers wishing to take the national certification examination. This subsidy is available only to teachers with three years of experience and must be paid back if the teacher does not complete the process or does not teach in North Carolina for at least one year after completing the process.

School Calendar

The General Assembly, in SL 1999-373 (S 977), made several changes in the way the school year calendar is constructed.

Section 115C-84.2 of the North Carolina General Statutes (hereinafter G.S.) requires a 220-day calendar each year. Of those 220 days, 180 must be scheduled for instruction. Of the 40 noninstructional days, 10 must be scheduled for teacher vacation days and approximately 10 must be scheduled for state holidays (the number varying slightly year to year depending on when Christmas falls). That leaves 20 days; of those, the statutes had provided that 10 could be designated by the local board of education for use as teacher workdays, additional instructional days (meaning that pupils would be in attendance more than 180 days), or other purposes designated by the board. SL 1999-373 changed that number from 10 to 8. The use of these 8 (the number had been 10) days may vary from employee to employee or from school to school, as the local board may delegate to the individual school the authority to schedule some or all of them. That leaves 12 days (as opposed to 10) to be scheduled.

Those remaining 12 days are to be scheduled by the principal of each individual school for use as teacher workdays, additional instruction days, or other purposes, uses that may vary from employee to employee. Prior to the 1999 legislation, the statute instructed the principal to schedule these days "in consultation with the school improvement team." The statute now reads that the principal is "to work with the school improvement team to determine the days to be scheduled and the purposes for which they should be scheduled." An additional provision in the 1999 legislation specifies that if during the past two years a local school administrative unit has made up an average of at least 8 days for school closings due to inclement weather, the local board may designate up to 2 of the 12 remaining days as additional make-up days to be scheduled after the last day of student attendance.

Leave

SL 1999-170 (H 820) adds a new G.S. 115C-12.2 directing the State Board to adopt rules to allow any employee of a public school to share leave voluntarily with a spouse, parent, child, brother, sister, grandparent, or grandchild (all including step, half, and in-law relationships) who is an employee of a public school or state agency. It also adds a new G.S. 126-8.3 directing the State Personnel Commission to adopt rules allowing state agency employees similarly to share leave with such relatives who are employed in a public school.

Certification, Hiring, Nonrenewal, and Dismissal Provisions

Assistant Principal Provisional Certificates

SL 1999-30 (S 225) and SL 1999-394 (H 274) together amend G.S. 115C-284(c), which, before the amendments, provided that the State Board "shall not issue provisional certificates for principals and assistant principals." That prohibition remains in place for principals, but the 1999 legislation permits the issuance of a one-year provisional *assistant principal* certificate to an employee of a local board of education if one of two sets of conditions applies. First, the one-year certificate may be issued if the local board determines that there is a shortage of persons who hold or are qualified to hold a

principal's certificate and the employee enrolls in an approved program leading to a master's degree in school administration before the provisional certificate expires. Second, the one-year certificate may be issued if the employee is enrolled in an approved master of school administration program and is participating in the required internship under the program. The State Board may extend the provisional certificate for a total of no more than two additional years while the employee is completing the program.

The same 1999 legislation also amends G.S. 115C-287.1 to clarify that, in employing a person under a one-year provisional certificate, a local board of education is employing that person as a school administrator—which normally would require a contract of at least two years in duration—but that the employment may be under a contract of only one year in duration since the certificate is issued for only one year.

Hiring Teachers without Certificates

The 1998 General Assembly added a new G.S. 115C-296.1 permitting a local board of education to determine that there is or will be a shortage of qualified teachers with North Carolina certificates available to teach specified subjects or grade levels and then to employ as teachers individuals who do not meet the qualifications for initial or continuing certification. Under that 1998 legislation, three categories of individuals could be employed, all of whom must have at least a bachelor's degree. The three categories are (1) individuals licensed in another state, (2) individuals with one year of community college, college, or university teaching experience, and (3) individuals with three years of other experience, if the local board determines that both the individual's experience and postsecondary education are relevant to the grade and subject to be taught.

Under the 1998 legislation, an individual in the first category receives certification without the necessity of taking the certification exam if he or she is hired for a second year, but individuals in the second and third categories, to receive certification, must pass the certification exam during the first year of teaching and be reemployed for a second year. SL 1999-96 (S 898) amends this last provision to make it clear that individuals in the second and third categories receive certification if they are reemployed for a second year and if they pass the certification exam during the first year of teaching or *prior to employment.* The effect is to permit someone who might be interested in entering teaching through the second or third category—as a safeguard against spending a year teaching and finding that he or she is unable to pass the exam—to go ahead and take the exam *before* beginning employment.

Nonrenewal

G.S. 115C-325(o) has required for years that probationary teachers whose contracts are not to be renewed for the coming year must be notified of that fact by 1 June. SL 1999-96 changes the notification deadline to 15 June.

Dismissal Procedure Changes

The General Assembly rewrote the teacher dismissal provisions of G.S. 115C-325 in the Excellent Schools Act of 1997. In 1999 the legislature made several changes to those new procedures. The first change relates to a teacher's request for a hearing upon notification that the superintendent intends to recommend dismissal. In such a case, the teacher may request a hearing either before a case manager or directly before the local board of education. Under the 1997 statute, if the teacher requested a hearing directly before the board, the hearing had to be held within five days of the request. The 1999 legislation changed that interim period to ten days.

The second change relates to the participation by the superintendent in a hearing before a case manager. The 1997 statute said that both the teacher and the superintendent had the right to be present and to be heard. The 1999 legislation makes it clear that the superintendent may be represented by a designee rather than appearing in person.

The third change relates to preparation of the transcript of any hearing before a case manager. The 1999 legislation clarifies that it is the obligation of the superintendent, upon receiving notice from the teacher following the teacher's hearing before the case manager that the teacher wants the matter to be heard before the local board of education, to request that a transcript of the case manager hearing be made and to send it to the teacher within two days of receiving it.

The fourth change relates to the obligation of the superintendent to provide to the teacher a list of witnesses whom the superintendent intends to call in a dismissal hearing. The 1997 statute said that the list had to be provided to the teacher at least ten days before the hearing; the 1999 legislation changed that to eight days.

Achieving Tenure

G.S. 115C-325(c) provides that a teacher is eligible for tenure after having served for four *consecutive* years as a probationary teacher. A *year* for this purpose means 120 days worked in a full-time probationary position within one school year. If a teacher does not work 120 days during a year, that year does not count and the next year worked starts a new set of four consecutive years. SL 1999-456 (H 162), in Section 34, adds a new G.S. 115C-325(c)(5) to provide that if a teacher fails to get in the 120 days because he or she is out on disability leave or sick leave, that year still does not count as one of the four years necessary for tenure, but it does not break the streak of four *consecutive years* and the next year worked adds onto the previous total.

Sexual Harassment and Improper Sexual Relations

Two acts passed by the 1999 General Assembly concern sexual harassment and improper sexual relations.

Employee Reports of Sexual Harassment

SL 1999-352 (H 1267) adds a new G.S. 115C-335 providing that no school board employee is to be disciplined in any way solely for the reason that the employee has filed a written complaint alleging sexual harassment by students, other school employees, or school board members, unless the employee reporting the harassment knows or has reason to believe that the report is false.

Indecent Liberties and Sexual Offenses with a Student

North Carolina has had two statutes dealing with the taking of indecent liberties with a child.[2] One, G.S. 14-202.1, prohibits acts of a sexual nature when (1) the perpetrator is sixteen years of age or older, (2) the victim is under the age of sixteen, and (3) the perpetrator is at least five years older than the victim. The other, G.S. 14-202.2, prohibits similar acts when (1) both the perpetrator and the victim are under the age of sixteen and (2) the perpetrator is at least three years older than the victim.

Effective for offenses committed on or after December 1, SL 1999-300 (S 742) creates another set of indecent liberties offenses, applicable to acts of a sexual nature by school personnel with a student enrolled in a public or a private elementary or secondary school. The definition of *indecent liberties* is essentially the same as that in G.S. 14-202.1 and -202.2, except it does not cover acts involving vaginal intercourse or sexual acts as defined in G.S. 14-27.1 (for example, oral sex). However, another new set of sexual offenses, also created by SL 1999-300, covers such acts when they are committed with elementary or secondary school students. For all of these new offenses, the sexual act must have occurred during or after the time the defendant and victim were at the same school but before the victim ceased to be a student. The new offenses are discussed below.

A teacher, school administrator, student teacher, or coach is guilty of a Class I felony if he or she takes indecent liberties with an elementary or secondary school student.[3] Such a person is guilty of a Class G felony if the act is vaginal intercourse or a sexual act as defined in G.S. 14-27.1.[4] Age is not relevant for either offense.

Other school personnel and volunteers at a school or at a school-sponsored activity also are subject to prosecution for taking indecent liberties with or for engaging in intercourse or other specified sexual act with an elementary or secondary school student. Age is a relevant factor, however. If the school employee or volunteer is four or more years older than the student, the indecent liberties offense is a Class I felony and the offense involving intercourse or other designated sexual act is a Class G felony.[5] If the age difference is less than four years, both offenses are Class A1 misdemeanors.[6]

The act states that a person who engages in the above conduct is guilty of the level of offense specified unless the conduct is covered by another law providing for greater punishment.[7] Thus a school employee could be convicted of statutory rape, a Class B1 felony, for having vaginal intercourse with a student if the ages of the employee and student meet the requirements for that offense. The employee could not be convicted of both statutory rape and one of the offenses described above, however.

2. This section of the article was written by John Rubin, professor of public law and government at the Institute of Government and a specialist in criminal law.

3. *See* G.S. 14-202.4(a).
4. *See* G.S. 14-27.7(b).
5. *See* G.S. 14-202.4(a), -27.7(b).
6. *See* G.S. 14-202.4(b), -27.7(b).
7. *See* G.S. 14-202.4(a), -27.7(b).

Improving Instructional Conditions for Teachers

Two acts passed by the 1999 General Assembly aim to improve the workload responsibilities of teachers.

Duty-free Periods

G.S. 115C-301.1 has long provided to all full-time, assigned classroom teachers a daily duty-free period during regular school hours—but only to the extent that the safety and proper instruction of the students allow and only insofar as the General Assembly provides funds. SL 1999-163 (S 1093) adds to the statute a provision stating that principals may not, without the consent of the teacher, unfairly burden a given teacher by making that teacher give up his or her duty-free period on an ongoing, regular basis.

Limiting Duties of New and Most Senior Teachers

SL 1999-96 adds a new G.S. 115C-47(18a) and amends G.S. 115C-296(e) to direct local boards of education to adopt rules and policies limiting the noninstructional duties assigned to teachers "to the extent possible given federal, State, and local laws, rules, and policies." The act also specifically provides that teachers with initial certification (that is, teachers in their first years) and teachers with twenty-seven or more years of experience may not be assigned extracurricular activities unless they request them.[8] ■

8. For a full analysis of this new statutory requirement, see "Additional Limitations on Noninstructional and Extracurricular Duties," also in this issue of *School Law Bulletin.*

Additional Limitations on Noninstructional and Extracurricular Duties

by Ann McColl

THE 1999 NORTH CAROLINA GENERAL ASSEMBLY passed SL 1999-96 (S 898), which adds to the list of local board duties spelled out in Section 115C-47 of the North Carolina General Statutes (hereinafter G.S.) new restrictions on assigning noninstructional and extracurricular duties to teachers. This summary addresses questions that education leaders may have in implementing the new requirements.

Statutory Requirements

Question 1. What exactly does the new statutory provision, G.S. 115C-47(18a), require?

The law establishes requirements as follows. Key terms are in italics. Local boards must establish policies or rules to provide for the following:

1. Teachers with initial certification (abbreviated as "ILTs") and teachers with twenty-seven or more years of experience (abbreviated as "27+Ts") are assigned *extracurricular duties* only if the teacher requests the assignment in writing.
2. *Noninstructional* duties of ILTs/27+Ts are *minimized*.
3. *Noninstructional* duties of all teachers are *limited* to the extent possible given federal, state and local laws, rules, and policies.
4. *Noninstructional* duties of teachers are distributed *equitably* among employees.

A local board may temporarily suspend its rule or policy for individual schools upon a finding that there is a compelling reason for the rules or policies not to be implemented.

While these requirements are relatively brief in form, they raise many questions about the exact meaning of the requirements and what schools must do to comply with the law.

Defining Professional Responsibilities

Question 2. This new requirement in G.S. 115C-47(18a) refers to *extracurricular duties* and to *other noninstructional duties*. What do these terms mean?

These terms are not defined by this new statutory provision or elsewhere in Chapter 115C, the chapter of the General Statutes that contains the public school laws. While there is no binding legal authority on the issue, a 1970 North Carolina attorney general's opinion seems to embody the idea that extracurricular activities are those that occur after normal school hours that are not related to the teacher's instructional duties.[1]

The author is general counsel to the North Carolina Association of School Administrators. A memorandum substantially similar to this article was previously distributed to the membership of that organization. Our thanks for permission to publish this version in *School Law Bulletin.*

1. Op. Att'y Gen. "Letter to Mr. Heyward C. Bellamy, Superintendent, New Hanover County Schools" (Dec. 9, 1970).

One term that *is* referenced in Chapter 115C is *special duty*.[2] This is a duty for which a career employee receives compensation on top of his or her regular salary. While school districts are not required to provide additional compensation for certain duties, the statute sets out the duty of an athletic coach or a choral director as examples of possible special duties.[3] Special duties could be considered a subset of extracurricular duties.

Question 3. If these terms are not defined by statute, how are they given meaning?

These terms should be defined by local board policy. Local boards are required by this new provision to establish board policy, and G.S. 115C-47(18) specifically provides that "[l]ocal boards of education, upon the recommendation of the superintendent, shall have full power to make all just and needful rules and regulations governing the conduct of teachers, principals, and supervisors, the kinds of reports they shall make, and their duties in the care of school property." In addition, local boards have the authority pursuant to G.S. 115C-47(4) to regulate extracurricular duties.

The superintendent should make recommendations to the board on policy that clarifies the various types of professional responsibilities, including instructional and noninstructional duties and extracurricular duties.

Question 4. What are sample definitions?

Each school district should carefully consider definitions that best describe its practices. A good definition will broadly describe the category and then provide some examples.

The following definitions were provided at the July meeting of the North Carolina State Board of Education (the State Board) as recommended revisions to the policy on the North Carolina Beginning Teacher Induction Program.

> "Non-instructional duties refers to those that are *not directly* involved with the instructional program or the implementation of the standard course of study. Examples would be: bus duty, lunch duty, hall duty.
>
> "The term extracurricular activities refers to those activities performed by a teacher involving students that are outside the regular school day and *not directly* related to the instructional program. Examples would be: athletic coach, after-school club sponsor."

Local boards have the option of adopting these definitions, modifying them, or establishing completely different definitions. For example, these definitions identify any duties that are "not *directly* involved or related" to instruction as being noninstructional duties or extracurricular duties. This standard will capture a wider range of duties to be subject to the statutory requirements than would the standard of "*not* involved or related."

Below are two similar definitions that could be considered.

Noninstructional duties are part of the professional responsibilities of the teacher to support the total school program and the school's or the school district's objectives but that are not related to classroom instruction, the instructional program, or the implementation of the standard course of study. Examples include: monitoring hallways or the cafeteria, greeting students or assisting with carpools, or bus duty.

Extracurricular duties are duties primarily performed outside of the regular school day that are not related to instructional duties. If the teacher is compensated for the extracurricular duty, then it is also considered a *special duty* as described above. Examples of extracurricular activities include: supervising student clubs that meet outside of the regular school day, coaching cheerleaders, or assisting with events held outside the regular school day, such as ticket taking or organizing sporting events or drama or music programs, unless the event is related to instructional duties, such as a band concert by the band director.

The definitions of noninstructional and extracurricular duties rely on some common understanding of instructional duties or the instructional program. Therefore it also may be useful to define instructional duties, a term that is not defined by statute and therefore can be defined by the local board in its policies.

A sample definition is as follows: *Instructional duties* are all responsibilities related to classroom instruction or the instructional program or the implementation of the standard course of study, regardless of whether the duty is performed during the regular school day or at other times, including but not limited to: teaching, lesson planning, curriculum development, evaluating student work, meeting with students and/or parents,

2. The definition is found in N.C. GEN. STAT. 115C-325(a), in the provision describing what constitutes a *demotion* for purposes of the Teacher Tenure Act.

3. G.S. 115C-325(a)(4)(iii).

professional development, departmental or school meetings, completing required records, addressing student needs within the classroom/instructional setting, participating in instructionally related student trips, and other duties related to the instructional program.

Question 5. Do the concepts of extracurricular duties, noninstructional duties, and instructional duties capture all of the responsibilities of teachers?

This new statutory requirement refers only to extracurricular and noninstructional duties and does not provide guidance on what other duties a teacher might have. School districts may want to consider having an overarching concept that establishes job expectations for teachers. One possibility is to establish, in board policy, the expectation that all teachers will fulfill their "professional responsibilities."

A sample definition is as follows: *Professional responsibilities* are all duties related to supporting the total school program and school and school district objectives and the responsibility to conduct oneself in a professional manner. Professional responsibilities encompass any duties mandated by law or that are necessary in order to comply with legal mandates; complying with the code of ethics adopted by the State Board; meeting reasonable requirements of the local board; and fulfilling instructional duties, noninstructional duties, and extracurricular duties that are required in compliance with the law and board policy.

Some of these concepts may overlap. For example, a legal mandate also may be an instructional duty. However, it still may be useful to broadly identify the board's expectations rather than to rely on piecing together the concepts of instructional, noninstructional, and extracurricular duties.

Question 6. What if a teacher disputes these definitions included in the local board policy?

Courts tend to be deferential to local boards in their policy-making function. Any reasonable interpretation of these concepts likely will withstand a legal challenge. As a part of good policy making, however, it is a good practice to involve stakeholders in formulating or responding to policy recommendations. Stakeholders in this situation include teachers, school administrators, and probably others as you consider the policy implications of limiting noninstructional duties.

Question 7. What does the statute mean when it states that noninstructional duties of ILTs/27+Ts must be *minimized*? How does this compare to the requirement that noninstructional duties of all teachers must be *limited* to the extent possible given federal, state, and local laws, rules, and policies?

Minimized and *limited* are not defined further by statute. Therefore it is up to the local board policy to provide guidance on meeting this standard. Both are relative terms rather than denoting a specific, absolute amount. This seems to reflect the potential tension between the goals of the statute of enabling these teachers to focus on professional growth and instructional duties and the local goals and operational needs to address the total school program. This tension underscores the importance of relating professional duties to school district goals.

Local Authority to Establish Professional Responsibilities

Question 8. With this new statutory requirement, can school districts still develop initiatives that may necessitate noninstructional duties by teachers?

Yes. The new provision specifically states that the "noninstructional duties of all teachers are limited to the extent possible given federal, State, and *local laws, rules, and policies*" (emphasis added). Presumably any locally adopted policy or rule may implicitly or explicitly require noninstructional duties of teachers in order to achieve the stated objectives of the policy or rule.

For example, many systems may be scrutinizing their safe school policies and plans to make sure they are doing what they can to provide a safe school environment. Local policies or rules could require teachers to participate in monitoring activities or other noninstructional activities related to providing a safe school.

While this new statutory provision does not limit local authority to adopt policies or rules that may require noninstructional duties, it would be within the spirit of the law for local school systems to review their policies and rules to determine the impact on teachers—as well as all other personnel—to carry out the policies. In addition, as new policies or rules are considered, it would be useful to have a process in place to assess the likely impact that carrying out the policy will have on personnel and the relationship between the policy or rule and the mission-critical objectives.

Question 9. What other legal considerations must be taken into account in establishing professional responsibilities?

A 1970 North Carolina attorney general's opinion addresses the issue of extracurricular activities. The opinion concludes: "Although no appellate court in North Carolina has spoken to the issue, we are of the opinion that the great weight of authority supports the assignment of extracurricular activities to public school teachers so long as the assignments are distributed impartially and are reasonable in number and hours of duty required."[4] The opinion rests on two legal principles: the expansive authority of the board of education to address the total school program in the interest of students, parents, and the community and the prohibition of discrimination. These two principles also apply in general to establishing professional responsibilities.

A 1999 attorney general's letter affirms a 1970 letter finding that teachers can be required to perform extracurricular duties. As part of the rationale, the letter quotes a court opinion outside of our jurisdiction: "Teaching is not limited to class room instruction, but also involves the complete training of a child for citizenship and leadership. Extracurricular activities can be a significant part of that training."[5]

The local board's authority also has been recognized by the North Carolina Court of Appeals, in *Abell II v. Nash County Board of Education*,[6] a case in which the court held that the board's action in nonrenewing two probationary teachers' contracts based on coaching changes was not arbitrary or capricious. In reaching its decision, the court noted the broad authority of the board over the status of probationary teachers and the authority and duty specified in G.S. 115C-47(4) to make all the rules and regulations that are necessary for extracurricular activities.

In regard to other legal requirements, teachers and other government employees have the right to be free from retaliation for exercising free speech rights. So, for example, suppose a teacher speaks out at a public hearing against the new promotion standards and the next week is given the extracurricular duty of monitoring the student body at all the away football games. If a connection can be established between the speech and the assignment, the teacher may be able to establish that his or her constitutional rights were violated.

Local leaders also may want to consider the State Board's policy on optimum working conditions for beginning teachers.[7] The policy, while not mandatory, specifies working conditions intended to give beginning teachers the opportunity to develop into capable teachers.

Question 10. Can a teacher's willingness to assume extracurricular or noninstructional duties be considered in evaluations or decisions regarding renewal of contracts?

An ILT/27+T has a right to forgo extracurricular duties that he or she has not requested in writing. These same teachers' noninstructional duties also are supposed to be minimized in order for ILTs to develop professionally and for senior teachers to have the opportunity to informally share their experiences and expertise. While the law does not address evaluations, it likely would be considered unreasonable to lower a teacher's evaluation for not being willing to assume extracurricular duties or noninstructional duties that go beyond the minimized duties referenced in the statute.

On the other hand, imagine a teacher who acts rudely in the way in which he or she refuses to accept duties. Or imagine a teacher who does not carry out reasonable noninstructional duties or accepted extracurricular duties in a satisfactory manner. Teachers may be required to behave professionally and carry out their duties in a professional manner to accepted standards. There is nothing in the law to indicate that these circumstances could not be considered in evaluating teachers or considering whether to renew their contracts. This issue of evaluation underscores the importance of being clear about what duties are considered a part of a teacher's professional responsibilities. (See questions 4 and 5.)

In addition, teachers who demonstrate initiative and commitment to the school's goals may be recognized. School administrators may want to consider how to develop a climate that encourages such traits while respecting the need of new teachers to focus on skills development.

4. *See supra* note 1.

5. Op. Att'y Gen. "Letter to Mr. Cliff B. Dodson, Superintendent, Union County Schools" (Jan. 6, 1999).

6. 89 N.C. App. 262, 365 S.E.2d 706 (1988).

7. *Policy Regarding the North Carolina Beginning Teacher Induction Program*, STATE OF NORTH CAROLINA, STATE BD. OF EDUC. POL'Y MANUAL (State Board of Education policy QP-A-022) (changes were presented at the July 1999 meeting of the State Board).

Request in Writing

Question 11. For an ILT/27+T to be given an extracurricular assignment, he or she must have requested it in writing. How may this requirement be met?

Consider the different types of circumstances in which the requirement may arise.

1. At the beginning of the school year, the school administrator is determining who will perform various extracurricular activities that year.
2. Occasionally a need arises for a teacher to perform an extracurricular duty, and the school administrator will be seeking a teacher to fulfill the duty.
3. A teacher wants to initiate a project that will necessitate performing extracurricular duties.
4. A position is being advertised that has certain extracurricular duties expected of the person who accepts the position, such as a teaching position with coaching duties or yearbook duties.

There likely are other types of circumstances, but this range demonstrates the need for different ways to satisfy the requirement for a written assignment request.

Form

In the first three circumstances, a form providing the critical language would be useful. The form can be as simple as "I request the following extracurricular duty:_____" followed by the person's signature.

In addition the form could address the following components:

- additional statutory or policy language can be added to more fully explain the form and its purpose or to better reflect the context of the "request" in cases where the administrator is seeking individuals to perform extracurricular duties.
- additional language that this request is voluntary.

These additional components are not essential to meet the statutory mandate. Your board attorney also may have recommendations on this issue.

Any Document Provided by the Teacher

A form also could satisfy the third circumstance of a teacher-initiated request, but any request made in writing will meet the statutory requirement. There is no need to be overzealous in the use of forms, unless uniformity is important to the school district or is considered especially useful for maintaining documentation.

Application/Rider to Application

The fourth circumstance—the advertised position—is different from the other three. Presumably the school system does not want the applicant to accept the position unless the applicant is agreeable to undertaking the extracurricular duties that are related to the position, regardless of whether the applicant is an ILT or 27+T. In this situation, a statement on the application might be more useful than a form. The following statement could be added on the application or rider to the application: "I am aware that this position requires certain extracurricular duties as specified in the job description and that by applying for this position, I request assignment to those duties." The signature on the application would then apply to this statement as well.

Question 12. Could a job applicant or an employee be asked to sign a statement requesting the assignment of any extracurricular duties recommended by the principal in order to eliminate the need to get a written request for each extracurricular duty?

The law does not specifically address this practice. However, the practice would at least appear to contradict the intent of the law to limit extracurricular duties to those requested in writing by ILTs/27+Ts. Consult with your board attorney before taking this approach.

Suspension of Policy

Question 13. In what situations may the local board temporarily suspend the rules or policies on extracurricular or noninstructional duties for a particular school?

The law does not specify the particular situations in which the rules or policies can be suspended. Rather it establishes a standard of making a finding of a *compelling reason* before the policies or rules are temporarily suspended. It is up to the local board to determine appropriate situations. Consider the following circumstances:

1. The school has such a high proportion of ILTs that it is clear that extracurricular duties cannot be adequately covered without ILTs throughout the school year.

2. An extracurricular duty requires certain skills or background that at a particular school are held only by ILTs and 27+ Ts, such as supervision of the school newspaper or literary magazine by an English teacher.
3. A situation arises unexpectedly at a school where staff that can be required to perform extracurricular activities are not available, and the position must be filled quickly, such as a ticket collector at the ball game where the assigned staff at the last moment is unable to come.

These circumstances show a range of conditions that could be considered compelling reasons for suspending the rules. There of course may be other conditions as well that would meet the standard of compelling reason for suspending the rules.

Question 14. Who must make the finding of a compelling reason, and what process is required?

The law states that the local board has the authority to suspend the rule upon a finding of a compelling reason for doing so. No particular process is required by the law, leaving some flexibility in how boards make their findings. Imagine the third circumstance described above. It is Friday afternoon and the teacher assigned to collect tickets at the football game that night tells the assistant principal that she is sick and cannot be there. The assistant principal goes through the roster of eligible teachers, and no one is available on short notice. The assistant principal asks some of the ILTs, and none are willing to go to the game. At this point, must the board of education hold an emergency meeting to suspend the rules? That would seem to be a rather dramatic result. Surely there are more reasonable ways to meet the requirements of the law.

One possible option is for the policy to specify those conditions that create a finding of a compelling reason for suspending the rule and also provide the length of the temporary suspension. This approach would not require any further action by the board. While this approach would work well in some situations, the drawback is that the policy would need to be able to anticipate a number of different types of circumstances that would create a compelling reason and the reasonable duration for suspending the policy.

Another approach would be to provide guidance to the superintendent and to delegate to the superintendent or superintendent's designee the responsibility of making a finding of a compelling reason. There is a legal hurdle to this option, in that the board must be able to delegate the authority of making the finding to the superintendent. Certainly there are circumstances in Chapter 115C that have been interpreted as allowing this delegation, although there are also certain board duties that are generally understood to be non-delegable. If authority is delegated, the local board should give clear guidance on what would be considered a compelling reason. This approach of having the superintendent make the finding would provide more flexibility to consider case by case decisions. However, even requiring the superintendent's approval may be cumbersome in emergency circumstances.

A third option is a blend of the other two options: certain circumstances are set out by board policy as meeting the requirements of a compelling reason. Any other circumstances could be resolved by the superintendent/designee following standards established by the board.

Question 15. What if an ILT/27+T disputes the suspension of the policy? Is there any right of appeal?

This depends on the particular board policy. If the board policy provides for the superintendent/designee or some other school official to make the decision to suspend the policies (see Question 14 above), then a right of appeal to the board likely exists pursuant to G.S. 115C-45(c) and -305. If the board itself made the finding and suspended the policy, there is no further right of appeal to the board. The law does not provide for any review by court of the decision. Any further legal challenge probably would have to be based upon a claim of infringement on other legal rights. (See Question 9.)

Issues to Consider for Board Policies and Administrative Practices

Question 16. So what are all the issues to be considered in board policy?

The following checklist is based on the answers to the questions we have considered so far.

1. Define at minimum the terms, extracurricular duties, and noninstructional duties. In addition, the concept of professional duties—which

may include instructional and noninstructional duties—also could be explicitly provided to make clear the school district's expectation of its teachers.
2. Clarify or provide guidance on the standard of *minimized* noninstructional duties for ILTs/27+Ts and *limited* noninstructional duties for all teachers, especially in regard to their relationship with local objectives and policies.
3. Establish the process for temporarily suspending the policy for particular schools.

Other issues that a board of education may want to consider in developing policies and practices related to professional responsibilities are as follows:

1. Identify and involve the stakeholders in assessing the issues and making recommendations.
2. Establish a process for reviewing board policies and school district/school level practices in regard to their relationship to strategic priorities and the impact of the time commitment required for teachers as well as other employees. The focus on student achievement, safe schools, and other specific priorities provides an opportunity to review various activities to ensure that they are aligned with these priorities and that all staff can focus to the extent possible on these mission-critical issues.
3. Explore the relationship between this policy on extracurricular duties and limiting noninstructional duties with other policies on professional development to make sure that the whole program for ILTs—and possibly all beginning teachers, including lateral entries—provides, within the resources available, appropriate support and guidance for their development.
4. School districts may want to consider how they will evaluate or monitor the implementation of this new law. Given the General Assembly's interest in education and its willingness to intervene, being able to substantiate what works and what does not work will be useful.[8]

8. This information, if forwarded to the North Carolina Association of School Administrators, may assist the NCASA in its efforts to represent the interests of schools in the General Assembly.

Changes Affecting Higher Education

by Robert P. Joyce

THE BIGGEST STORY in higher education legislation in the 1999 session of the North Carolina General Assembly was a bill that did not pass—S 912—which, in its original form, would have authorized the sale of $2.7 billion in State of North Carolina University Improvement Security Interest Bonds and $300 million in State of North Carolina Community College Security Interest Bonds. The impetus behind the proposal was the recognition that over the next ten years, the university expects to enroll an additional 48,000 students while the community college system faces corresponding increases in demand.

The bonds would have been *limited obligation bonds* (meaning that the university and the community college system would pledge various kinds of assets as security for the bonds) and not *general obligations bonds* (which would have pledged the full faith and credit and taxing authority of the state for their repayment). Being limited obligation bonds, they would not have required a vote of the people under the state constitution. Because of the no referendum feature, and the size of the proposal, the bonds faced stiff opposition.

The bill passed the senate at the $3 billion level with no referendum. The version that eventually passed the house called for $1 billion in university bonds and $200 million in community college bonds, contingent on a favorable vote in a referendum. The session ended with the two houses unable to agree on a final bill.

The author is editor of *School Law Bulletin* and an Institute of Government faculty member whose specialties include higher education law.

Other higher education issues in the 1999 session were far less attention-grabbing. This article presents a summary of the changes that were enacted.

Appropriations and Salaries

UNC Current Operations

The Current Operations and Capital Improvements Act, SL 1999-237 (H 168), commonly referred to as the budget act, appropriates to The University of North Carolina (UNC) Board of Governors—for the operation of all UNC campuses and hospitals—$1,644,244,323 for fiscal 1999–2000 (an increase of about $110 million over the immediately preceding year) and $1,656,863,227 for fiscal 2000–2001.

Community Colleges Current Operations

The budget act appropriates to the Community Colleges System Office $579,803,851 for fiscal 1999–2000 (an increase of about $14 million over the immediately preceding year) and $591,015,693 for fiscal 2000–2001. SL 1999-321 (H 275) adds a new Section 96-6.1 to the North Carolina General Statutes (hereinafter G.S.). This new section levies on employers, as a part of their unemployment compensation levy, a mandatory contribution (calculated at levels specified in the statute) to be used to create the Employment Security Commission Training and Employment Account to provide funds for community college working training programs. Consistent with that legislation, the General

Assembly appropriated from the Account, to the Community Colleges System Office, $22 million for fiscal 1999–2000 and $56.5 million for fiscal 2000–2001. These funds are to be used for equipment and technology, regional and cooperative initiatives, the New and Expanding Industry Training Program, and the Enhanced Focused Industrial Training Programs. Should the Account produce more than the funds appropriated, 80 percent of the excess is to be appropriated for these purposes.

Capital Improvements

UNC

The budget act appropriates to the UNC Board of Governors a total of $20 million for capital improvements for 1999–2000. Section 29.5 specifies that these funds are to be used for facility renovation and repair. It also directs the board of governors to allocate these funds among the UNC constituent institutions that by fall 2003 are expected to grow in enrollment by 20 percent and that received a certain low facilities' condition rating in a recent study conducted for the board.

Community Colleges

Capital improvements for community colleges are primarily a county and not a state responsibility. Nonetheless, the budget act appropriates, for 1999–2000, $14.5 million for a grant-in-aid of $250,000 to each of the fifty-eight community colleges for the purposes of capital improvement or land acquisition. These funds are not subject to a matching requirement.

Salaries

Section 28.12 of the budget act provides sufficient funds for salary increases for UNC employees (faculty members and others) to receive an average salary increase of 3 percent, to be distributed to employees according to rules adopted by the board of governors. Teaching employees of the School of Science and Mathematics received an average salary increase of 7.5 percent.

Section 28.11 provides sufficient funds for salary increases for community college employees (full-time and part-time) to receive an average salary increase of 3 percent, to be distributed according to rules adopted by the State Board of Community Colleges.

Every UNC and community college employee also received a one-time payment of $125.

UNC Governance

Horace Williams Campus

In 1985 the General Assembly, through G.S. 116-36.5, created a special continuing and nonreverting trust fund, composed of proceeds from the lease or rental of property in the Centennial Campus of North Carolina State University, to be used for the development of the Centennial Campus. SL 1999-234 (H 1134) amends that statute to add directly corresponding provisions for the Horace Williams Campus of the University of North Carolina at Chapel Hill. The 1999 legislation also amends Article 21B of Chapter 116, which permits the board of governors to issue revenue bonds, payable from any revenues from the Centennial Campus, without a pledge of taxes or the full faith and credit of the state, to make the provisions of the article applicable also to the Horace Williams Campus. The Horace Williams Campus is defined as the real property and appurtenant facilities left to UNC–CH by the will of Henry Horace Williams and other property and facilities designated by the board of governors.

Hospital Real Property

SL 1999-252 (H 985) amends G.S. 116-37 and -40.6 to provide that acquisitions and dispositions of any interest in real property for use by the University of North Carolina Health Care System or the East Carolina University Medical Faculty Practice Plan are not subject to the provisions of Article 36 of Chapter 143 or any of the provisions of G.S. Chapter 146, which together give general control over state buildings to the Department of Administration.

Student Aid and Tuition

Aid to students attending private colleges. Section 10 of the budget act raises from $900 to $1,050 the amount per full-time equivalent student that is paid by the state to North Carolina private colleges that enroll North Carolina undergraduate students. Private colleges use these funds to provide financial assistance to needy North Carolina students. The act also raises from $1,600 to $1,750 the amount that is granted to each full-time North Carolina undergraduate student attending a private college in this state. (These funds may not be used for the benefit of prisoners.)

The State Education Assistance Authority is to report to the Joint Legislative Education Oversight

Committee on the number of students enrolled in off-campus programs and the state funds collected for such students. Section 10.1 of the budget act places limitations on the extent to which these funds may be used for students enrolled in off-campus programs. Section 10.1 also provides that any member of the armed services residing temporarily in North Carolina incident to military duty who does not qualify as a resident for tuition purposes is eligible for the $1,750 payment if he or she is enrolled as a full-time student.

Wake Forest and Duke Medical School assistance. Section 10 of the budget act sets at $8,000 and $5,000 for Wake Forest and Duke, respectively, the amount that is to be disbursed for each North Carolina resident medical student enrollee.

Escheat Law Rewrite

The North Carolina Constitution provides that *escheats* (certain kinds of abandoned property that, after passage of time, become the property of the state) "shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State." By the provisions of G.S. Chapter 116B, escheats are placed in the Escheat Fund and the income derived from the Escheat Fund is paid yearly to the State Education Assistance Authority for use as student loans. SL 1999-460 (S 244) rewrites major portions of G.S. Chapter 116B, enacting a new North Carolina Unclaimed Property Act, spelling out the kinds of property subject to escheat, how such property is determined to be abandoned, how the state is to take custody of such property, how it may be recovered by rightful owners, and similar matters.

President's Budget Authority

G.S. 116-30.1 and -30.2 permit UNC constituent institutions to be named *special responsibility constituent institutions*. That designation gives the chancellor of the institution flexibility in making spending decisions across certain budget codes containing General Fund appropriations. The budget act, in Section 10.14, adds a new G.S. 116-30.3 and amends G.S. 116-14 to grant to the president of the University of North Carolina a corresponding flexibility in making spending decisions from appropriations made to UNC. It also provides that, subject to approval by the board of governors, the president may establish and abolish employment positions within her staff complement as may the chancellor of a special responsibility constituent institution.

North Carolina Progress Board

G.S. 143B-372.1 establishes the North Carolina Progress Board (composed of appointees of the governor, the Speaker of the house of representatives, and the president pro tempore of the senate, along with four appointees of the board itself) and charges it with (among other things) encouraging the discussion and understanding of critical global and national social and economic trends that will affect North Carolina in the coming decades, undertaking new and ongoing policy research and benchmarking studies, and reporting to North Carolinians every five years on prospects for progress over the next twenty to thirty years. Section 10.11 of SL 1999-237 moves the Progress Board from the Department of Administration to the UNC Board of Governors and locates it at North Carolina State University (NCSU). The chancellor of NCSU is to appoint an executive director for the board, who is to serve at the pleasure of the chancellor.

Community College Governance

State Level Name Change

SL 1999-84 (H 260) makes a number of technical changes to Chapter 115D, the chapter of the General Statutes that contains the basic community colleges statutes. In addition to the purely technical changes, the act changes throughout the statute the name of the Department of Community Colleges to the Community Colleges System Office.

Performance-Based Budgeting and Carry-forward Funds

The budget act, in Section 9.2, adds a new G.S. 115D-31.3 directing the State Board of Community Colleges to create new accountability measures and performance standards to be used for performance budgeting for the community college system. Required standards are to include (1) progress of basic skills students, (2) passing rate for licensure and certification examinations, (3) goal completion of program completers, (4) employment status of graduates, and (5) performance of students who transfer into the university system. Colleges may choose one other measure from a specified list. A college meeting the new performance standards is to be allowed to carry forward funds remaining in its budget up to 2 percent of the state funds allocated to the

college for that year, to be used for the purchase of equipment and initial program start-up costs other than faculty salaries.

Student Financial Assistance and Tuition

The budget act, in Section 9.4, allocates $5 million for each year of the 1999–2001 biennium to be used to provide financial assistance to community college students on the basis of need.

In Section 9.5, the budget act provides that the State Board of Community Colleges may not charge tuition or fees to volunteer firefighters and volunteer EMS workers for courses required for certification.

Student on State Board of Community Colleges

SL 1999-61 (H 244) enacts a new G.S. 115D-2.1(b)(5), which adds, as an ex officio member of the State Board of Community Colleges, the person serving as president of the North Carolina Comprehensive Community College Student Government Association. This student member has all rights of other board members except the right to vote.

Campus Police

For many years the boards of trustees of constituent institutions of UNC have had the authority to establish campus law enforcement agencies and employ campus police officers with the same powers of law enforcement as granted to officers generally. SL 1999-68 (H 477) adds a new G.S. 115D-21.1 permitting boards of trustees of community colleges to establish campus law enforcement agencies on the same basis as the UNC institutions. The territorial jurisdiction would be all property owned or leased to the college and the portions of any public road or highway passing through the property or immediately adjoining it. A college with a campus police agency may enter into joint agreements with municipalities and counties (with the consent of the sheriff) to extend the jurisdiction of the campus police into the municipality or county.

Financial Flexibility

The budget act, in Section 9.5, authorizes each community college to use all state funds allocated to it (excluding Literacy Funds and Funds for New and Expanding Industries) for any authorized purpose that is consistent with the college's Institutional Effectiveness Plan. The same section, noting allocations of additional monies for instructional and administrative support, directs that transfers made in college budgets from faculty salaries to other purposes may be made only after public notice and notice to the faculty. No more than 2 percent statewide may be transferred from faculty salaries without the approval of the State Board of Community Colleges.

Cooperation with County in Property Matters

SL 1999-115 (H 239) adds a new G.S. 153A-158.2 and a new G.S. 115D-15.1, provisions that authorize a county—upon a request from a community college board of trustees and following a public hearing—to acquire any interest in real or personal property by any lawful method (including eminent domain) for use by a community college within the county and to dispose (through sale or otherwise) any of this property to the community college for any price and on any terms negotiated between the board of trustees and the board of county commissioners. The trustees are authorized to accept the property.

A community college board of trustees, for its part, may, in connection with additions, improvements, renovations, or repairs, dispose (through sale or otherwise) any of its property to the county for any price and on any terms negotiated between the board of trustees and the board of county commissioners—subject to approval by the State Board of Community Colleges. Any agreement by which the community college transfers property to the county must require that the county transfer the property back to the community college after any financing agreement entered into by the county to finance the additions, improvements, renovations or repairs has been satisfied. If no such financing agreement is made, the agreement must require that the county transfer the property back as soon as the additions, etc., are completed. If a financing agreement is made, the obligations are to be the responsibility of the county alone and not of the board of trustees of the community college.

New College for Anson and Union Counties

In 1998 the General Assembly directed the county commissioners of Anson and Union counties to develop and submit to the State Board of Community Colleges a contract for establishing a new multicampus community college to serve the two counties, or a proposal for separate community colleges to serve the two counties, or another proposal for providing community college access for citizens of the two counties. Because

the counties could not agree on a single proposal, the General Assembly in 1999 passed SL 1999-60 (S 1039), which establishes a new college and abolishes the old Anson Community College. The legislation sets out how members of the board of trustees of the new college are to be appointed and directs that new board to give the new college a name.

Studies

The 1999 General Assembly, through the budget act, authorized or directed the following studies with respect to higher education:

Section 9 directs the State Board of Community Colleges to contract with an outside consultant to study the issue of whether community college system faculty should be employed for less than twelve months instead of on a twelve-month basis since the system now operates on a semester instead of a quarter basis.

Section 9.1 requires the State Board of Community Colleges and the State Board of Education to report on ways to increase the number of qualified high school students participating in cooperative high school education programs provided by local community colleges.

Section 9.7 directs the State Board of Community Colleges to review the Adult High School Program to determine the extent to which the program is aligned with recent public school reforms, including course content standards and end-of-course tests.

Section 9.14 authorizes the Joint Legislative Education Oversight Committee to study the need to streamline the community college capital construction process.

Section 10.20 directs the UNC Board of Governors to study the salaries and other compensation of faculty of the constituent institutions of UNC in order to attract and retain the best academic professionals, maintain the level of excellence for which UNC institutions are known, and maximize learning opportunities for students.

Section 10.20 also directs the UNC Board of Governors to study the structure, management, and use of prepaid tuition plans and college savings plans in North Carolina. ■

School Law Bulletin
looks at recent court decisions
and attorney general's
opinions.

Clearinghouse

edited by
Ingrid M. Johansen

Cases and Opinions That Directly Affect North Carolina

School district may be held liable under Title IX for student-on-student sexual harassment when the school is deliberately indifferent to the harassment and when the harassment is so severe that it effectively bars the victim's access to educational benefits. Davis v. Monroe County Board of Education, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).

Facts: Aurelia Davis sued the Monroe County (Ga.) board of education, alleging that it had violated Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) by allowing a fellow student, G.F., to sexually harass her daughter during her fifth grade year. The harassment lasted for several months, and despite repeated complaints by Davis and her daughter (as well as from other girls in the school who suffered harassment at the hands of G.F.), school officials took no action to stop it. Davis's daughter suffered a steep decline in her grades, wrote a suicide note, and expressed fear that she would not be able to keep G.F. "off her." The harassment finally ended when G.F. was charged with, and pleaded guilty to, sexual battery.

Davis's case was accepted for review by the United States Supreme Court after the case had been dismissed by the Eleventh Circuit Court of Appeals. The lower court had ruled that school districts could not be held liable under Title IX, which prohibits sex discrimination in educational programs receiving federal funds, for student-on-student sexual harassment. [see "Clearinghouse," *School Law Bulletin* 27 (Spring 1996): 33–34]. Because Title IX was enacted under Congress's constitutional spending clause authority, the court reasoned, federal fund recipients must be given unambiguous notice of the conditions imposed on receipt of those funds. While Title IX clearly provided notice that recipients had to stop their employees from behaving discriminatorily in order to receive funds, the Eleventh Circuit did not believe it provided sufficient notice of a duty to prevent student-on-student harassment.

The Supreme Court granted review of this case in order to resolve the question of whether Title IX provides a private cause of action (one seeking monetary damages) against a school district for student-on-student harassment. Some courts had answered in the negative, following reasoning similar to the Eleventh Circuit's [see, for example, the digest of *Rowinsky v. Bryan Independent School District* in "Clearinghouse," *School Law Bulletin* 27 (Summer 1996): 46–47], while other courts had held that a school district may, indeed, be liable for such student misconduct under Title IX [see, for example, the digest of *Brzonkala v. Virginia Polytechnic Institute* in "Clearinghouse," *School Law Bulletin* 29 (Summer 1998): 28–29].

Ingrid M. Johansen is a research fellow at the Institute of Government.

Holding: The United States Supreme Court held that a school district may be liable for monetary damages for student-on-student sexual harassment when the district acts with deliberate indifference to the harassment and when the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to educational opportunities or benefits. The Court reversed the Eleventh Circuit's ruling and sent the case back for further hearings in accord with its opinion.

The Court agreed with the school board that under Title IX recipients can be held liable only for their own misconduct and not for the misconduct of third parties. However, the Court disagreed with the school board's argument that Davis sought to hold the board liable for G.F.'s misconduct. Davis, the Court said, sought to hold the board liable for the board's *own* decision to remain idle in the face of student-on-student harassment about which it had knowledge. The Court concluded that Title IX places a duty on a school board *not to permit* harassment in its schools by third parties (even fellow students) who are under its control. In this way, the Court's decision is similar to last term's decision in *Gebser v. Lago Vista Independent School District* [see "Clearinghouse," *School Law Bulletin* 29 (Fall 1998): 21–22], where the Court found that Title IX allows money damages if a school board is deliberately indifferent to known acts of teacher-to-student sexual harassment.

The duty not to permit harassment by third parties under the board's control (even fellow students) is triggered only in cases where the board (through its agents) has actual knowledge of the harassment. In such cases, if the board deliberately refuses to take action to halt the harassment, or responds in a way that clearly is unreasonable, it can be held liable in monetary damages if the harassment is sufficiently serious. For the harassment to be sufficiently serious, it is not enough for a student to be teased or called offensive names; the harassment must be so severe that it undermines and detracts from the student's educational experience to the extent that it effectively denies the harassed student equal access to a school's resources and opportunities.

School boards had adequate notice of this duty from numerous sources, found the Court. For example, Title IX's regulatory scheme requires funding recipients to monitor third parties for discrimination in certain circumstances and to refrain from some forms of interaction with outside entities that are known to discriminate. In addition, the common law has long held boards responsible for failure to protect students from tortious acts by third parties—including their own peers. Further, the National School Boards Association recognized in a 1993 publication that districts could probably be held liable under Title IX for failing to respond to student-on-student harassment, and the Department of Education promulgated policy guidelines in 1994 that stated that student-on-student harassment was covered by Title IX.

In the present case, the Court believed that Davis had presented sufficient evidence to entitle her to a hearing on whether the board showed deliberate indifference to sexual harassment and whether that harassment denied her daughter equal access to educational opportunity.

Systemwide mandatory school uniform policy did not clearly violate student's First Amendment rights to free exercise of religion or free speech; court will not block application of the policy to objecting student. Hicks v. Halifax County Board of Education, No. 5:98-CV-981-BR(2) (E.D.N.C. Feb. 12, 1999).

Facts: Aaron Ganues, formerly a third grade student at McIver Elementary School in Halifax County (N.C.), was suspended from that school for violating the systemwide mandatory school uniform policy. His great-grandmother and guardian, Catherine Hicks, filed a lawsuit protesting the application of the policy to Aaron as a violation of his rights to free exercise of religion and free speech under the First Amendment to the United States Constitution. Adherence to the uniform policy, under the argument put forward by Hicks and Aaron, would amount to allegiance to the spirit of the anti-Christ by preparing Aaron to conform to the will of the anti-Christ in the "last days."

Although Halifax County school officials would not let Aaron attend McIver without adhering to the uniform policy, Willie Gilchrist, the Halifax superintendent, contacted two contiguous public school units without uniform policies and ascertained that Aaron could enroll in either school unit. Gilchrist informed Hicks of these possibilities and offered Aaron transportation to school in either system at board expense pending the outcome of this litigation, but Hicks asserted that Aaron had the right to attend his assigned elementary school. She sent Aaron to the Tabernacle Church School during the litigation, having enrolled him in order to comply with state compulsory school attendance laws, at a cost of $130 per month.

Arguing that the enforcement of the uniform policy was causing Aaron irreparable harm, Hicks asked the federal court for the Eastern District of North Carolina for a preliminary injunction prohibiting the school system from applying the uniform policy to Aaron pending trial on the issues raised in her legal claim.

Holding: The court denied Hicks's request, finding that because enforcement of the policy did not violate Aaron's rights under the First Amendment, he suffered no irreparable harm.

The court found Hicks's claim of deprivation of freedom of religion unpersuasive. Under the rule established by the United States Supreme Court in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), generally applicable religion-neutral laws that have the effect of burdening a particular religious practice are constitutional and need not be justified by a compelling governmental interest. Under the *Smith* rule, the uniform policy would be constitutional. Hicks argued, however, that an exception to the *Smith* rule, known as the *hybrid rule*, governed this situation. Under the hybrid rule, the First Amendment may bar the application, in appropriate cases, of generally applicable, religion-neutral laws if such laws not only burden the right to free exercise of religion but also interfere with the liberty of guardians to direct the upbringing and education of their children. The court found this argument unpersuasive in Aaron's case, noting that in each case where the hybrid rule has been held to apply, the law in question has potentially endangered an entire way of life, not just a specific religious belief. By the hybrid rule, a state cannot enact laws that prevent guardians from choosing a specific educational program for their children—for example, prohibiting attendance at private religious schools or forbidding the teaching of German—but it does have the power to determine what will be taught in the public schools. In this case, since the uniform policy does not affect Hicks's right to choose Aaron's educational path, the hybrid rule does not apply and the policy is constitutional under *Smith*.

The court also found Hicks's free speech argument unpersuasive. Hicks asserted that Aaron's wearing of different clothing was "an expression of religious-based opposition to the mandatory uniform policy," which the policy unconstitutionally punished. For conduct (such as not wearing the uniform) to amount to protected speech, the court said, the conduct must be engaged in with an intent to convey a particularized message and there must be a great likelihood that the message would be understood by those who view the conduct. The court found that Aaron's not wearing the uniform would not communicate any particular message to those seeing him and further, that the policy neither dictated a certain form of speech nor prohibited other expressions. The policy did not, the court concluded, unconstitutionally limit Aaron's right to free speech.

Waiver signed by motorcycle safety student did not relieve instructor of liability for negligence. Fortson v. McClellan, 131 N.C. App. 635, 508 S.E.2d 549 (1998).

Facts: Anne Fortson took a motorcycle safety program at Lenoir (N.C.) Community College. As a condition of participating in the program, she signed a waiver form stating that she would not sue the instructor, Ross McClellan, or other participants for any injury she might suffer as a result of their negligence. On the second day of the program Fortson was injured when, according to her allegations, McClellan assigned her to a motorcycle that he knew had throttle problems.

Fortson sued McClellan, alleging that his negligence caused her injury. McClellan responded by claiming that the waiver Fortson signed barred her suit. The trial court agreed and granted judgment for McClellan before trial. Fortson appealed.

Holding: The North Carolina Court of Appeals reinstated Fortson's claim, finding that the waiver was void as against public policy.

Though disfavored in the law, in most cases waivers and releases that absolve persons from liability for negligence will be honored. This case, however, falls into the public policy exception to that general rule. An activity falls within the public policy exception when (1) the activity is extensively regulated to protect the public from danger and (2) those engaging in the activity owe a duty to the public to be careful. McClellan could not protect himself from liability through the use of a waiver because he was performing an activity in which the public has a high level of concern about safety and for which he owed the public a duty. The public's safety interest is involved because both those receiving instruction in the proper use of motorcycles and the general traveling population are at risk if the instruction is negligent. The existence of such a public interest is proven by the General Assembly's extensive regulation on the issue of motorcycle safety. Therefore it is against public policy to allow McClellan to use a pre-safety-instruction waiver to relieve himself of the

duty to exercise reasonable care in teaching motorcycle safety.

Full panel of Fourth Circuit Court of Appeals rules on claims of university student who was raped by fellow students. Brzonkala v. Virginia Polytechnic Institute and State University, 169 F.3d 820 (4th Cir. 1999).

Facts: Christy Brzonkala, a student at Virginia Polytechnic Institute (VPI), was raped by two members of the VPI football team. As a result of the rape, Brzonkala stopped going to class, cut off her long hair, avoided contact with classmates, and finally attempted suicide. She sought retroactive withdrawal from VPI for the academic year because of the trauma. In April of what would have been her freshman year, she filed charges against the football players under VPI's sexual assault policy. After a series of proceedings during which VPI took many seemingly questionable steps to avoid punishing the rapists, Brzonkala filed suit against VPI, charging that its handling of her rape claim and its failure to punish the rapists in any meaningful way violated Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681), which prohibits gender discrimination in educational programs receiving federal funds. She also alleged that the rapists violated the Violence against Women Act (VAWA) (42 U.S.C. § 13981), which gives a private cause of action to any person injured in a crime of violence motivated by gender.

The federal court for the Western District of Virginia dismissed Brzonkala's claims, finding that VPI could not be sued under Title IX for the misconduct of third parties and finding that the VAWA was an unconstitutional exercise of congressional power. Brzonkala appealed these rulings, and a three-judge panel of the Fourth Circuit Court of Appeals (1) reinstated part of her Title IX claim and (2) found that the VAWA was constitutional and that Brzonkala had made a claim under it. [see "Clearinghouse," *School Law Bulletin* 29 (Summer 1998): 28–29]. A full panel of the Fourth Circuit then vacated the panel's ruling and issued its own judgment on the district court's ruling.

Holding: The full panel of the Fourth Circuit Court of Appeals vacated the district court's dismissal of Brzonkala's Title IX claim but affirmed its finding that the VAWA was unconstitutional.

Title IX and student-on-student harassment. Brzonkala's Title IX claim, in relevant part, alleged that VPI's failure to appropriately address her rape created a sexually hostile educational environment—an environment in which male student athletes could gang rape a female student without receiving any significant punishment and in which the female victim received no real assistance. The district court had reasoned that VPI could not be held responsible under Title IX for the action of the rapists and dismissed the claim. The Fourth Circuit, however, ordered the district court to reinstate the claim but to delay ruling on it until after the United States Supreme Court had ruled in the case of *Davis v. Monroe County Board of Education*, which concerned whether Title IX allows an action against school officials for student-on-student harassment. *[Editor's note: the* Davis *ruling has now been issued—see digest above. Under the standard set out in* Davis*, VPI can be held liable under Title IX if the district court finds that (1) VPI knew about the harassment suffered by Brzonkala and was deliberately indifferent to it and (2) the harassment was sufficiently severe to deny Brzonkala equal access to educational benefits and opportunities at VPI.]*

Violence against Women Act unconstitutional. Section C of the VAWA creates a private cause of action against any person who commits a crime of violence motivated by gender and allows the injured party to obtain compensatory damages, punitive damages, and injunctive, declaratory, or other appropriate relief. Congress enacted it as an exercise of its constitutional power to regulate interstate commerce and to enforce equal protection of the laws within states. The Fourth Circuit agreed with the district court that under either of these justifications for the VAWA the Congress had exceeded its constitutional authority and held Section C of the VAWA unconstitutional.

Court of Appeals affirms finding that falling light fixture was due to negligence of East Carolina University employee. Robinson v. North Carolina, ___ N.C. App. ___, 514 S.E.2d 301 (1999).

Facts: As part of Delores Robinson's job as a case worker for the Pitt County Department of Social Services, she interviewed clients at satellite offices, including an office at the Pitt County Mental Health Center, a building owned and maintained by the East Carolina University (ECU) School of Medicine. A light fixture fell from the ceiling of that building onto her head, injuring her. Robinson filed against ECU a claim under the State Tort Claims Act and a claim for workers' compensation with the Industrial Commission [see "Clearinghouse," *School Law Bulletin* 29 (Fall 1998): 25]. The full commission awarded Robinson damages. ECU appealed.

Holding: The North Carolina Court of Appeals affirmed the judgment in favor of Robinson. The court began by stating that it could not substitute its judgment for the commission's if there was competent evidence to support the commission's findings and legal conclusions. Here the evidence showed that ECU owned the building and was responsible for electrical repairs. An ECU electrician had worked on the light that fell shortly before the accident happened and testified that the light would not have fallen unless somebody had been "working on it or messing with it." He also testified that the light could only be reached by means of a ladder. Thus the commission had ample evidence to find that the light would not have fallen without some kind of negligence on the part of an ECU employee.

State statute of limitations period applies to the filing of administrative hearings under the Individuals with Disabilities Education Act. Manning v. Fairfax County School Board, 176 F.3d 235 (4th Cir. 1999).

Facts: Scot Manning, a special education student, was suspended from the St. John Davis Vocational Center (Va.) for ten days after he violently attacked teachers, maintenance workers, and fellow students. At the end of that period his school system extended the suspension for another three days because of safety concerns. Scot was then put in a new placement, which his mother, Betty Manning, approved on May 6, 1993.

In January 1995 Manning requested a state-level administrative due process hearing, alleging that the extension of Scot's suspension violated the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400) and that certain elements of his individualized education plan were improperly implemented. State hearing officers held that her request for an administrative hearing was barred by Virginia's one-year statute of limitations governing personal actions. Manning then filed suit in federal district court, seeking a declaratory judgment that no statute of limitations applied to the filing of administrative hearings under the IDEA or, if a statute of limitations did apply, that it was Virginia's five-year limitation period for contract actions, not the one-year period for personal actions. The district court agreed with the state hearing officers and found Manning's claim time-barred. Manning appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the district court judgment. The Fourth Circuit had already held that Virginia's one-year limitation on personal actions applied to *judicial* appeals from special education decisions in Virginia. Here it made the same ruling with respect to administrative hearings. The court found unpersuasive Manning's argument that because the IDEA contains no express statute of limitations for administrative appeals no limitation period at all should apply. Administrative appeals are sufficiently similar to judicial appeals, the court reasoned, that to exempt them from any limitation period *at all* would create an extreme anomaly.

The court next rejected Manning's argument that the five-year limitations period should apply instead of the one-year period. Under Virginia law, the one-year limitation statute provides that "every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action accrued." Since the court had already held that this statute of limitations applies to judicial actions, it found little reason to grant a much longer appeals period for an administrative hearing. One year, said the court, strikes an appropriate balance between the need for speedy resolution of disputes and the need to assure that parties have a fair opportunity to obtain review of special education decisions.

Forsyth Technical Community College not responsible for negligence of firefighter training course instructor whom it did not select and over whom it had no right of control. Strickland v. Board of Trustees of Forsyth Technical Community College, No. COA93-338 (N.C. Ct. App. Jan. 19, 1999) (unpublished op.).

Facts: Richard H. Strickland was injured during a firefighter training course taught by Mike Koontz and organized under a contract between the Forsyth County (N.C.) Volunteer Firemen's Association and Forsyth Technical Community College (FTCC). Under the contract, FTCC agreed to, among other things, "supervise instruction" and the firemen's association agreed to procure instructors.

Strickland brought suit alleging that Koontz's negligence was responsible for his injuries. He sued Koontz and also sued FTCC, alleging that FTCC was liable for Koontz's negligence as he was FTCC's employee. The trial court entered judgment for FTCC before trial, finding that FTCC could not be held liable for harm caused by Koontz. Strickland appealed.

Holding: The North Carolina Court of Appeals, in an unpublished opinion (meaning it creates no binding legal precedent), affirmed the judgment in favor of FTCC.

The evidence presented by FTCC showed that Koontz was not an FTCC employee and that FTCC did not control how he performed his instructional duties. Therefore FTCC could not be held liable for his alleged negligence. Koontz, who otherwise worked as a full-time dispatcher with the Forsyth County Fire Department, was selected for the position by the firemen's association and never had any contact with a FTCC employee or representative. He was paid with a check from the firemen's association. The firemen's association had exclusive control over the methods of instruction used in the training course and retained sole authority to hire and fire instructors. According to evidence presented by FTCC and the firemen's association, the provision in the contract granting FTCC authority to "supervise instructors" was inserted merely to give FTCC the right to require that only certified instructors be used to teach the course.

Because Strickland presented no evidence to contradict this showing that FTCC did not have an employer's right to control Koontz, there was no genuine issue for trial and summary judgment for FTCC was appropriate.

Public university professors not deprived of equal protection by law that exempts their workload requirements from the scope of collective bargaining agreements. Central State University v. American Association of University Professors, 526 U.S. __, 119 S. Ct. 1162, 143 L. Ed. 2d 227 (1999).

Facts: In 1993 the state of Ohio enacted a law, Ohio Rev. Code Ann. § 3345.45, providing that all state universities must take formal action to adopt a faculty workload policy that increased emphasis on teaching and reduced emphasis on research. Section 3345.45 further provided that these workload policies could not be the subject of collective bargaining. Central State University (CSU) adopted such a policy, and the American Association of University Professors (AAUP), the collective-bargaining agent for CSU professors, filed a complaint in Ohio state court alleging that Section 3345.45 unconstitutionally created a class of public employees—state university professors—who were not entitled to bargain about their workload.

The Ohio Supreme Court agreed with the AAUP, finding that Section 3345.45 violated the Equal Protection Clause of the United States Constitution by depriving the professors of equal protection of the laws. This was so, the court found, because Section 3345.45's collective-bargaining exemption bore no rational relationship to the state's interest in correcting the imbalance between teaching and research in state universities. CSU appealed.

Holding: The United States Supreme Court reversed the Ohio Supreme Court's judgment, finding no equal protection violation. When a legislative classification does not involve a suspect classification (such as race or gender) and does not implicate a fundamental interest, the standard for withstanding an equal protection challenge is low. The legislature need only show that the classification was not arbitrary or irrational. The Ohio legislature could, the Supreme Court stated, rationally believe that the imposition of a workload requirement not subject to collective bargaining was a rational step to increase the time spent by faculty members in the classroom. Because this belief was not arbitrary or irrational, it withstood constitutional scrutiny.

North Carolina State University employee was terminated because of poor job performance, not because of age or gender discrimination. Street v. North Carolina State University, No. 5:98-CV-174-BO(3) (E.D.N.C. Feb. 19, 1999).

Facts: Jutta Street served as an academic coordinator in North Carolina State University's academic support program for student athletes from 1991 until she was terminated in 1996. Street had personality conflicts with the director of the program, failed to meet deadlines, and reportedly showed a poor attitude at work. When a new program director was hired, he dismissed Street. In the academic term before Street was dismissed, eight of the football players under her supervision were on academic suspension for poor scholastic performance. Under the man who replaced Street—who was younger than she—only two players faced similar suspension.

Street filed suit in federal court for the Eastern District of North Carolina, alleging that her termination violated the prohibitions on age and gender discrimination contained in the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 623) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000), respectively. The university filed a motion seeking judgment in its favor before trial.

Holding: The district court granted the university's motion, finding that Street had failed to present any issue of material fact that would entitle her to judgment on her claims. Although Street showed that she was a member of the classes protected by Title VII and

the ADEA—a female over the age of forty—and that she suffered an adverse employment decision, she failed to produce evidence of an important required element for this kind of discrimination claim: that her job performance met her employer's legitimate expectations. Because the university presented evidence that Street was not performing up to its expectations and Street was unable to rebut this evidence, the university was entitled to judgment in its favor.

School district identified student as disabled in a timely manner and provided her a free appropriate public education; student's parents are entitled to reimbursement for one independent educational evaluation only. Kirkpatrick v. Lenoir County Board of Education, No. 4:97-CV-168-BO(1) (E.D.N.C. Mar. 31, 1999).

Facts: In 1993 Meridith Kirkpatrick began high school in the Lenoir County (N.C.) school system. Near the end of the school year, in April 1994, her parents sent her for an educational evaluation because she was having academic difficulties, was consistently late to class, and failed to complete assignments. This evaluation revealed no signs of specific learning disabilities. Later that same month, Meridith was admitted to Holly Hill Mental Hospital following a runaway episode. The hospital records contained no indication that she suffered from learning or other disabilities that might have entitled her to special education. That summer Meridith went to a private summer school program to make up credits for classes she had failed during her first year of high school.

For the 1994–95 school year Meridith attended the Grier School, a private boarding school in Pennsylvania. She was expelled before the end of the school year and returned to the Lenoir County school system. She passed all her courses and was never tardy. During the 1995–96 school year, however, she failed several classes and her teachers noted that she had difficulty staying on task. In April of 1996 school officials initiated procedures to evaluate Meridith for possible special education services. These procedures included giving her parents notice of their due process rights under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400).

The school district's evaluation found no indication of a learning disability. The Kirkpatricks obtained two private evaluations, one of which reported that Meridith had attention deficit disorder and another which questioned this diagnosis. The Kirkpatricks requested and received an independent educational evaluation at public expense, and this evaluation suggested that Meridith might qualify as disabled based on her attention deficit disorder. After receiving this evaluation school officials implemented a plan for Meridith that incorporated all the suggestions contained in the evaluation; the plan was not, however, an individualized education plan (IEP) and was perhaps less extensive than an IEP would have been.

The Kirkpatricks initiated administrative proceedings against the school board, alleging that it had failed to timely identify Meridith as a student with disabilities entitled to special education and that it had failed to provide her with a free appropriate public education (FAPE). They sought reimbursement for private school tuition and for all of the independent educational evaluations they had paid for. The state review officer ordered the board to develop an IEP for Meridith and to reimburse the Kirkpatricks for the independent evaluations; the review officer found that the board did not fail to timely identify Meridith as disabled or to provide her with a FAPE, so the board did not have to reimburse the Kirkpatricks for private school tuition. Both parties appealed this ruling, and the Kirkpatricks sought attorney fees.

Holding: The federal court for the Eastern District of North Carolina reversed the administrative ruling insofar as it ordered the board to reimburse the Kirkpatricks for the cost of any independent evaluations. The court also ruled that the Kirkpatricks were entitled to a limited award of attorney fees.

The administrative determination that the board did not fail to timely identify Meridith as a student with disabilities or to provide her a FAPE was appropriate, the court began. Given that none of the numerous evaluators the Kirkpatricks hired before February 1996 found any indication of a learning disability, that Meridith had periods of success at school, and that the board had initiated evaluation procedures at the time the first independent determination that Meridith might qualify for special education services was made, the board's response was reasonable. And though the board did not develop an IEP for Meridith at that time, the educational plan it did implement provided her with a FAPE, said the court. Thus the Kirkpatricks are not entitled to reimbursement for the costs of private school tuition.

The Kirkpatricks received one independent evaluation of Meridith at public expense. Under the IDEA, parents are limited to a single evaluation at public ex-

pense. Even if this were not the case, two of the three evaluations for which the Kirkpatricks sought reimbursement occurred *before* the board's evaluation of Meridith, meaning that they were not sought as a result of *disagreement* with the board's evaluation, as required by the IDEA regulation under which they sought reimbursement.

Finally, the Kirkpatricks sought attorney fees as "prevailing parties" in this action because the board was ordered to develop an IEP for Meridith. The court noted that this was the only issue on which they prevailed and that it arose and was concluded at the administrative level. Therefore the court ordered that the Kirkpatricks be reimbursed only for those attorney fees that resulted in the unappealed administrative ruling requiring the board to develop the IEP.

School bus driver's injuries were not due to accident that occurred while she was operating the school bus; she is not entitled to disability benefits for the injury. Brock v. Henderson County Schools, In the North Carolina Industrial Commission, I.C. No. 630242 (Feb. 3, 1999).

Facts: In 1995 a pickup truck struck the school bus Anna Brock was driving for the Henderson County (N.C.) schools. Subsequently she began treatment with an occupational health physician for pain in her lower back and left hip. Brock's medical records revealed, however, that as far back as 1983 she had complained of similar pain as a result of earlier, non-work-related injuries. Medical testimony in the case tended to show that the 1995 bus accident did not cause or exacerbate Brock's lower-back condition. The testimony also indicated that Brock had not been conscientious in following prescribed steps to ease her pain or to improve her healing process and that her complaints were, at the least, exaggerated.

Holding: The Industrial Commission found the medical testimony credible and Brock's testimony not credible. It therefore concluded that her lower back condition was unrelated to the bus accident and that she was not entitled to disability benefits.

University failed to show that termination of employee who was disabled on the job was conduct-related. East v. North Carolina State University, In the North Carolina Industrial Commission, I.C. No. 448691 (Apr. 9, 1999).

Facts: Rayvon East suffered permanent partial disability in his left arm, back, and right leg as a result of attempting to ride a fractious horse in the course of his duties as general maintenance man at a camp facility administered by North Carolina State University. At that time East was in his fifties and unable to read and write, and his only other job experience consisted of working in a furniture factory thirty years ago.

After a period of rehabilitation, in June 1995 East returned to work with restrictions, including walking and standing on level surfaces only, a twenty-five-pound lifting restriction, and a prohibition on climbing ladders. In the autumn of 1996, East discovered, during the course of a physical examination for a life insurance policy, that he had serious lung and heart problems. As a result of these medical problems and attempts to treat them, East missed twenty-three days of work between October 1996 and February 1997. His supervisor was aware of the problem and made no complaints at the time, though he did request a note from East's doctor specifying that East could perform certain of his duties at the camp.

In March of 1997 the supervisor issued East a warning, complaining of his failure to bring the doctor's note and, for the first time, mentioning East's numerous absences. At about this same time the supervisor stopped accommodating East's work restrictions. When East was injured as a result of performing work that was not within the given medical restrictions, the supervisor refused to give him work that was sitting-only, as prescribed by his doctor. The supervisor terminated East when he was unable to perform this work. The supervisor gave the following reasons for the termination: (1) East informed the supervisor that he was being treated by one doctor for his work-related injury, while in fact he was being treated for unrelated conditions by other doctors; (2) East had frequent absences, allegedly unexplained; (3) East was insubordinate in refusing to perform duties within his physical limitations; and (4) East spread untrue negative remarks about his employer.

East initiated proceedings in the North Carolina Industrial Commission seeking disability payments.

Holding: The commission found no credible evidence that East was terminated for misconduct. In fact, the commission stated, the evidence tended to show that East was terminated precisely because of the physical limitations he will permanently have as a result of his work-related injury. The work-related injury, East's inability to read, his limited work experience, and his recent heart and lung problems all made it futile, the commission found, for East to seek employment or to

earn any wages at this time. Because his termination was not for reasons connected to misconduct, East was entitled to continuing total disability benefits beginning from the date of his termination until the commission orders otherwise. The commission also awarded East reasonable attorney fees.

Arbitration agreement contained in a university employee's transfer request became binding part of her employment contract. Martin v. Vance, ___ N.C. App. ___, 514 S.E.2d 306 (1999).

Facts: Pamela Martin, who had worked at Duke University since 1990, was terminated from her position as staff assistant in the Department of Neurology because she allegedly falsified her time cards. She filed suit against Duke and her supervisors (the defendants) alleging numerous causes of action, including intentional infliction of emotional distress and tortious interference with contract. The defendants moved to have Martin's claims dismissed, arguing that she had signed a binding arbitration agreement and could not file suit in court until she had completed the arbitration process.

The trial court rejected the defendants' motion. The arbitration policy, which called for an outside arbitrator to hear all grievances involving the termination of an employee, was explained in Duke's personnel manual and had been a part of that manual since 1994. An explicit statement acknowledging the arbitration policy and agreeing to it was contained in a transfer/upgrade request Martin had signed and filed before she was terminated. The trial court found that neither the policy manual nor the signed agreement to arbitrate contained in the transfer/upgrade request were part of Martin's employment contract; instead, they were unilateral policies promulgated by the university. The defendants appealed.

Holding: The North Carolina Court of Appeals reversed the trial court and ordered that court proceedings in Martin's case be halted until she completed the arbitration process.

The arbitration policy was binding on Martin, the court found. The only question was whether Martin had in fact agreed to arbitration of any claims as set forth in the personnel manual. Martin was aware of the policy: it had been a part of the personnel manual since 1994, so when she signed the upgrade/transfer request containing the arbitration agreement in 1997, she knew that any claim arising out her employment would be subject to arbitration. In fact, Martin first sought review of her termination-related claims through this very arbitration procedure before she filed suit in court. Thus there is every reason to believe that she signed the arbitration agreement with full knowledge and assent to its content.

Federal court enforces arbitration agreement between Duke University and terminated employee. St. Clair v. Duke University, No. 5:99-CV-127-BO(2) (E.D.N.C. May 14, 1999).

Facts: Duke University terminated Fern St. Clair, a staff nurse for the university's medical center, for performance problems. While employed at the university, and as a condition of her employment, St. Clair was subject to the "Employee Grievance Procedure," which provided for three levels of internal review of contested employment actions and, if the action involved termination from employment, a hearing with an outside arbitrator.

After St. Clair was terminated, she claimed that the university discriminated against her on the basis of her age and went through the three levels of internal review but filed suit in court immediately thereafter instead of seeking an arbitration hearing. The university moved to have the court compel St. Clair to submit her claim to arbitration.

Holding: The federal court for the Eastern District of North Carolina granted the university's request. The Federal Arbitration Act (FAA) (9 U.S.C. § 2) governs the interpretation and enforcement of the university's arbitration agreement, the court found. The FAA directs courts to rigorously enforce agreements to arbitrate and, when there is any doubt as to the scope of such agreements, instructs that they be resolved in favor of arbitration. Therefore the court ordered St. Clair to submit her claim to arbitration and stayed her court claim pending completion of arbitration.

Plaintiff suing North Carolina Central University must file complaint in her own name, not under a pseudonym. Doe v. North Carolina Central University, No. 1:98CV01095 (M.D.N.C. Apr. 15, 1999).

Facts: Jane Doe was raped by her supervisor while working as a security officer for North Carolina Central University (NCCU). The supervisor attempted a second rape at a later date but was stopped by one of Doe's colleagues. Doe then reported the supervisor's behavior to NCCU police headquarters, and the supervisor was fired. Doe claimed that other employees and managers at NCCU retaliated against her after she reported the

rape. Doe sued NCCU for violating Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e).

NCCU filed a motion to dismiss Doe's complaint because she filed under the pseudonym "Jane Doe" and not under her real name. Doe petitioned the court to let her proceed under the pseudonym.

Holding: The federal court for the Middle District of North Carolina denied NCCU's motion to dismiss but conditioned the denial on Doe filing an amended complaint using her real name within ten days of the decision's issuance.

In limited circumstances plaintiffs may be allowed to proceed with claims anonymously, but there is a presumption against it in the Federal Rules of Civil Procedure. In addition, there is a strong free speech interest in identifying parties to an action by name in order to keep court proceedings truly public. Doe failed to present sufficient evidence to overcome the presumption because the only factor she showed in favor of her request was that she would suffer embarrassment and emotional distress if forced to reveal her name. The court found that emotional distress—without more evidence—was not enough to counter the risk of unfairness that requiring NCCU to defend itself from an anonymous plaintiff might pose.

Other Cases and Opinions

School board's practice of opening its meetings with a prayer is unconstitutional. Coles v. Cleveland Board of Education, 171 F.3d 369 (6th Cir. 1999).

Facts: The Cleveland (Ohio) board of education held meetings that were open to the public approximately twice per month during the school year. At such meetings the board heard public comments, addressed student grievances and disciplinary issues, and regularly presented achievement awards to students—students who often were joined by their friends and family. A student representative served on the board.

In 1992 the newly elected president of the board announced that each meeting would open with a prayer. Usually a member of the local religious community (almost always a member of the Christian faith) chosen by the president delivered the prayer. In 1996 the board's new president—a Christian minister—began to offer the opening prayer himself.

A student and a teacher (the plaintiffs) from the Cleveland school system filed suit against the board, alleging that the practice of opening meetings with prayer violated the Establishment Clause of the First Amendment to the United States Constitution. The federal court for the Northern District of Ohio found the practice constitutional, and the plaintiffs appealed.

Holding: The Sixth Circuit Court of Appeals reversed the district court ruling, finding that the prayers did violate the Establishment Clause.

Two strains of case law vied to govern the analysis of this case. The first, argued for by the board, derived from the case of *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the United States Supreme Court held that the practice of opening legislative sessions with prayer was constitutional. The second, argued for by the plaintiffs, derived from a long line of cases dealing with religious activity in the specific context of the public schools. This line of cases culminated with the case of *Lee v. Weisman,* 505 U.S. 577 (1992) [see "Clearinghouse," *School Law Bulletin* 23 (Summer 1992): 23], in which the Court held that school-sponsored prayer at graduation ceremonies was unconstitutional.

The issue in this case, said the court of appeals, was whether the Cleveland school board meetings more closely resemble the sessions of a deliberative body such as a legislature—and thus are governed by the precedent set in the *Marsh* case—or whether they are more appropriately characterized as school-related functions—thus bringing them under the precedent of *Lee*.

The court determined that the board meetings were school-related functions and should be judged under the line of cases culminating with *Lee*. Several factors supported this conclusion, found the court: (1) meetings were conducted on school property, (2) by school officials, and (3) were regularly attended by students who actively participated in discussions of school-related matters. That school board members, like legislators, are publicly elected officials was a similarity insufficient to bring this case into the *Marsh* line. Because the function of the school board is directed toward school-related matters, its constituency is unlike that of state legislators: The board's constituency necessarily includes students, yet students cannot vote and are thus unable to express their discomfort with state-sponsored prayer through the electoral process.

As in other public school–religion cases, the constitutionality of a religious practice is assessed by determining whether it has a secular purpose, has the effect of advancing religion, or excessively entangles a govern-

mental entity with religion. The practice of opening school board meetings with prayer violated all three prongs of this test, the court found. The board had asserted that the prayers served the secular purpose of solemnizing its meetings, but the court found that statements of board members (for example, that the purpose of the prayers was to acknowledge "Christians who participate in the schools" and that "the moment you kick prayer out of the school, the Lord walks out of the school") and the nature of the prayers themselves (which included frequent references to the Bible and to Jesus) cast serious doubt on the sincerity of the asserted purpose.

In addition, said the court, the prayers had the effect of advancing religion because the prayers contained repeated references to the Bible and to Jesus; the president of the board—a Christian minister—delivered the prayers himself; and the board constantly interacted with elementary and secondary school children. Finally, the fact that a member of the school board composed and delivered the prayer led to an excessive entanglement of the board with religion.

Student does not have a constitutionally protected interest in participating in interscholastic athletics. Jordan v. O'Fallon Township High School District No. 203, 706 N.E.2d 137 (Ill. 1999).

Facts: Kevin Jordan was a star of the 1997 O'Fallon High School football team during his junior year. He received letters of interest from several universities and was named captain of the team for the 1998 season. Jordan was denied the right to play in 1998, however, after he violated the school's zero-tolerance rule on drug and alcohol use for the second time. Police officers who had picked up Jordan early one morning reported to the school principal that Jordan showed obvious signs of inebriation and had, in fact, confessed to alcohol consumption. Jordan contended that he had not violated the zero-tolerance policy but had been attacked by unknown assailants who threw beer bottles at him during the assault.

Jordan and his attorney administratively appealed the decision to ban Jordan from the team to the district superintendent, who informally heard their argument. They were not, however, granted an opportunity for a formal hearing at which they could examine the police officers and present testimony supporting Jordan's version of events. The superintendent affirmed the ban and invited Jordan to appeal to the school board. Jordan instead filed suit in state court, alleging that he had been deprived of a constitutionally protected interest in playing football without appropriate due process safeguards.

Holding: The Illinois Supreme Court found that the right to play interscholastic athletics is not constitutionally protected and therefore that Jordan could not succeed in his due process claim.

In order to prevail on a due process claim, a plaintiff must show that a property interest is being affected. In this case, Jordan was required to show that he had a constitutionally protected property interest in playing interscholastic football. To do that he needed to show more than an abstract need or desire to play football, more than a unilateral expectation that he would play: He was required to show that he had a legitimate claim of entitlement to play. Courts have repeatedly held that no such entitlement or interest exists in taking part in interscholastic athletics—playing is a privilege, not a right.

Jordan contended, however, that because of his athletic talent, playing football had a substantial economic value to him insofar as he anticipated turning that talent into a university scholarship. Therefore he was entitled to due process safeguards before the school deprived him of the right to play. Again the court disagreed. Although Jordan did have some legitimate expectation of receiving a scholarship, he did not have a scholarship in hand, and it is impossible to predict whether the events of the 1998 football season would have resulted in his receiving one. This unrealized expectation was insufficient to elevate his desire to play into a constitutionally protected right. ■